**[2021] UKUT 0245 (TCC)**

**Appeal number: UT/2020/000370**

***INCOME TAX – CAPITAL GAINS TAX – HMRC application for tax-related penalty under paragraph 50 of Schedule 36 to the Finance Act 2008 – Respondent's continuing failure to comply with an information notice – statutory conditions satisfied - application granted – penalty imposed***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

**- and -**

**SUKHDEV MATTU** **Respondent**

**TRIBUNAL: Judge Timothy Herrington**
**Judge Rupert Jones**

**Sitting in public at The Rolls Building, London EC4 on 28-29 June 2021**

**Ben Elliott and Laura Ruxandu, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants**

**Michael Firth, Counsel, instructed by Leigh Carr, Accountants, for the Respondent**

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DECISION

## Introduction

1. This is an application ("the Paragraph 50 Application") made by the Applicants ("HMRC") under paragraph 50 of Schedule 36 to the Finance Act 2008 ("Sch 36") for a tax-related penalty to be imposed on Mr Sukhdev Mattu ("the Respondent") in relation to his alleged failure to comply with an information notice issued on 28 August 2019 ("the Information Notice").

2. To date, none of the information and documents requested in the Information Notice have been provided by the Respondent. On 8 October 2020, HMRC made the Paragraph 50 Application. The Tribunal issued directions on 12 November 2020. On 14 December 2020, HMRC filed and served their statement of case. On 18 December 2020, the Respondent requested permission to withdraw from the proceedings. The Tribunal consented to that withdrawal on 4 January 2021.

### *The reinstatement and postponement applications*

3. Following further correspondence, on 25 May 2021 the Respondent made a late application for reinstatement which was granted by the Tribunal on 27 May 2021 subject to him fulfilling two conditions, which had not been complied with in full by the time the substantive hearing of the application was due to be heard.

4. Accordingly, on the first morning of the substantive hearing Mr Firth applied for the Respondent to be reinstated as a party to proceedings pursuant to Rule 17(3) of the Upper Tribunal (Tribunal Procedure) Rules 2008.

5. In addition, on the first morning of the substantive hearing, the Respondent did not attend Court. Mr Firth, his counsel, informed us that the Respondent had been admitted to hospital on the previous day, Sunday 27 June, and remained there at that time. Mr Firth therefore applied for proceedings to be postponed so that, when well and recovered, the Respondent might attend to give evidence in person.

6. We heard both the reinstatement and postponement applications at the outset of the substantive hearing. We delivered an oral decision allowing the reinstatement application but refusing the postponement application and then proceeded to the substantive hearing of the Paragraph 50 Application.

7. We set out in the Appendix to this decision the background to the reinstatement and postponement applications and our reasons for our decisions on those applications.

### *The substantive application*

8. Paragraph 50 of Sch 36 ("Paragraph 50") provides as follows:

> "(1) This paragraph applies where–

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

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

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

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

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

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

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

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

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

…

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

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

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

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

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

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

9. Accordingly, it can be seen that the imposition of a penalty under Paragraph 50 is dependent upon HMRC, upon whom the burden lies, satisfying the Upper Tribunal that the five statutory conditions set out in sub-paragraph (1) of Paragraph 50 are met in this case. The Respondent contends that none of the five statutory conditions have been satisfied. He also contends that even if the Tribunal decides to the contrary, this is not a case where it would be appropriate for the Tribunal to impose a penalty. The Respondent contends that the relevant level of seriousness the imposition of a penalty

under Paragraph 50, which is to be reserved for the most serious cases of non-compliance has not been reached.

10. We shall proceed to decide the Paragraph 50 Application by first considering in turn whether each of the five statutory conditions have been satisfied, making such findings of fact and law as are necessary in relation to each of the conditions concerned. If we are so satisfied, we will then proceed to consider whether it is appropriate to impose a penalty and, if so, the amount of the penalty to be imposed. In making that decision we shall, as required by sub-paragraph (3) of Paragraph 50, have regard to the amount of tax which has not been, or is not likely to be, paid by the Respondent.

***The evidence of the parties and overview of their cases***

11. Before turning to these matters, we make reference to the evidence that was before us.

12. We had a witness statement from Mr Jordan Jackson, an officer of HMRC who is a Civil Investigator for HMRC's Fraud Investigation Service, Offshore Corporate and Wealth team. Mr Jackson's witness statement, on which he was cross examined, dealt first with what was known by HMRC about the Respondent's UK tax affairs since he began filing UK Self-Assessment tax returns. It then went on to deal with those aspects of the Respondent's tax affairs which are under investigation and how the investigation proceeded under Mr Jackson's direction.

13. Mr Jackson deals in his evidence with the question as to whether the documents requested under the Information Notice were in the Respondent's possession or power and whether he had a reasonable excuse for the failure to comply with the Information Notice. Mr Jackson then goes on to set out his reasons for believing that there has been an underpayment of tax. This is based on HMRC's contention that the Respondent: a) is the settlor and sole beneficiary of an offshore trust, the Taj Trust, with the consequence that the Respondent is liable to income tax in respect of income that has arisen to various companies owned by the Taj Trust under Chapter 2 of Part 13 of the Income Tax Act 2007 ("the Transfer of Assets Abroad legislation"), Chapter 5 Part 5 of the Income Tax (Trading and Other Income) Act 2005 ("the Settlements legislation"); and b) is also liable to capital gains tax in respect of gains that have arisen to any of the non-UK entities owned by the Taj Trust by virtue of the application of sections 13 and 87 of the Taxation Chargeable Gains Act 1992.

14. Mr Jackson then goes on to say that he has reason to believe that as a result of the Respondent's failure to comply with the Information Notice, the amount of tax is significantly less than it would otherwise have been. Mr Jackson estimates that if the Respondent were to be subject to UK income tax and capital gains tax in respect of the transactions referred to above, then the additional tax due for the relevant tax years would amount to £1,916,315.

15. We found Mr Jackson to be an honest and reliable witness, doing his best to assist the Tribunal. We have therefore accepted his evidence substantially in full.

16. We also had a short witness statement from the Respondent and also from Mr Onofrio Sanfilippo, of Leigh Carr Chartered Accountants, the firm that deals with the Respondent's UK tax affairs. The Tribunal gave permission for those witness statements to be admitted following the Tribunal's conditional agreement to the Respondent's case being reinstated on 27 May 2021.

17. In his witness statement the Respondent explains the steps he took in response to the Information Notice and denies that he was ever a settlor or economic settlor of the Taj Trust. He also denies that he received any distributions from the Taj Trust or any underlying offshore companies. He does, however, accept that evidence obtained by HMRC shows that he did clarify to a representative of the Trustee of the Taj Trust and his then solicitors "my understanding that I was the discretionary beneficiary of the Taj Trust".

18. Because the Respondent did not attend the hearing it was not possible for him to be cross-examined on his witness statement. We have therefore attached limited weight to his evidence, but, as findings of fact below demonstrate, we have found his evidence as regards the question of whether he was the settlor and the economic settlor of the Taj Trust and whether he received any distributions from that trust to be contradicted by the documentary evidence.

19. Mr Sanfilippo explained in his witness statement the role of his firm in relation to the response to the Information Notice and the steps his firm took to appeal against the Penalty Notice issued by HMRC under paragraph 39 of Sch 36. As explained below, we have not accepted his evidence as to the filing of the appeal, and we found his evidence regarding the other matters to be of limited assistance. Mr Sanfilippo was cross examined, but he was unable to provide helpful answers to many of the questions because they related to matters which he said fell within the knowledge of the senior partner of his firm, Mr De Souza, rather than himself. We received no explanation as to why in those circumstances, Mr De Souza had not been offered as a witness.

20. In addition, we had a bundle of documents prepared by HMRC consisting primarily of the information that they obtained during the course of their investigation. We have based our findings of fact on that documentation and the witness evidence referred to above.

**First statutory condition for the imposition of a penalty - Paragraph 50(1)(a) - whether the Respondent has become liable to a penalty under paragraph 39 Sch 36**

***The Respondent's case on the first statutory condition***

21. Despite the Respondent not including it as a ground for opposing the application in his formal correspondence with the Upper Tribunal, in his opening skeleton argument Mr Firth submitted for the first time that the Respondent has not become liable to a penalty under Paragraph 39 of Sch 36 (" the Paragraph 39 Penalty") within the meaning of paragraph 50(1)(a) such that a penalty under Paragraph 50 may not be imposed upon him. Mr Firth submitted that this was a consequence of the fact that there is a "live"

appeal before the FTT against the penalty imposed upon the Respondent under paragraph 39.

22. There is no dispute that if there remains an outstanding appeal to the FTT in respect of the Paragraph 39 Penalty then the Respondent has not "become liable to a penalty" – to be liable to the penalty, not only must HMRC have imposed the penalty but any challenge to that penalty needs to have been resolved.

23. In addition, the Respondent submitted that the FTT has exclusive jurisdiction to determine his liability to a Paragraph 39 Penalty and therefore the Upper Tribunal cannot determine issues relevant to that liability (for example, whether he had a reasonable excuse for failure to comply).

***Relevant Law - Schedule 36 Finance Act 2008***

24. Schedule 36 contains HMRC's powers to obtain information by issuing information notices and to enforce compliance with such notices by issuing penalties.

25. Pursuant to paragraph 1, HMRC may issue an information notice to a taxpayer (a "taxpayer notice") requiring the taxpayer to provide information and/or documentation which is reasonably required for the purpose of checking the taxpayer's tax position:

> "**Paragraph 1 – Power to obtain information and documents from taxpayer**
> (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") –
> (a) to provide information, or
> (b) to produce a document,
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph."

26. Pursuant to paragraph 3(2), HMRC may apply to the First-tier Tribunal ("FTT") for the approval of a taxpayer notice and, if approval is granted, the taxpayer does not have the right to appeal (under paragraph 29) against the notice:

> "**Paragraph 3 – Approval etc of taxpayer notices and third party notices**
> …
> (2) An officer of Revenue and Customs may ask for the approval of the Tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).
> (2A) An application for approval under this paragraph may be made without notice (except as required under sub-paragraph (3)).
> (3) The Tribunal may not approve the giving of a taxpayer notice or third party notice unless– (a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs,
> (b) the Tribunal is satisfied that, in the circumstances, the officer giving the notice is justified in doing so,

(c) the person to whom the notice is to be addressed has been told that the information or documents referred to in the notice are required and given a reasonable opportunity to make representations to an officer of Revenue and Customs,
(d) the Tribunal has been given a summary of any representations made by that person, and
(e) in the case of a third party notice, the taxpayer has been given a summary of the reasons why an officer of Revenue and Customs requires the information and documents.
…"
"**Paragraph 29 – Right to appeal against taxpayer notice**
(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.
…
(3) Sub-paragraph (1) does not apply if the Tribunal approved the giving of the notice in accordance with paragraph 3."

27. Pursuant to paragraph 7, where a taxpayer is issued with an information notice, they must provide the requested information and/or documentation within the period specified in the notice:

"**Paragraph 7 – Complying with notices**
(1) Where a person is required by an information notice to provide information or produce a document, the person must do so–
(a) within such period, and
(b) at such time, by such means and in such form (if any), as is reasonably specified or described in the notice.
…"

28. Paragraph 18 confirms that a person is not required to provide a document if it is not within their possession or power:

"**Paragraph 18 – Documents not in person's possession or power**
An information notice only requires a person to produce a document if it is in the person's possession or power."

29. Paragraph 39 empowers HMRC to issue a penalty of £300 to a person who fails to comply with an information notice:

"**Paragraph 39 – Penalties for failure to comply or obstruction**
(1) This paragraph applies to a person who–
(a) fails to comply with an information notice,…
…
(2) The person is liable to a penalty of £300.
(3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43."

30. Paragraph 44 provides that a failure by a person to comply with an information notice by the specified time does not give rise to a liability to a penalty if the person complies within such further time as HMRC have allowed:

> "**Paragraph 44 – Failure to comply with time limit**
> A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed."

31. In addition, paragraph 45 provides that a liability to a penalty under paragraph 39 does not arise if the person has a reasonable excuse for the failure to comply with the information notice:

> "**Paragraph 45 – Reasonable excuse**
> (1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the Tribunal) the Tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.
> (2) For the purposes of this paragraph–
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,
> (b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and
> (c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased."

32. Pursuant to paragraph 47, a person has the right to appeal against a penalty and the procedure on appeal is set out in paragraph 48, which provides (*inter alia*) that the appeal is subject to Part 5 Taxes Management Act 1970 ("TMA 1970"):

> "**Paragraph 47 – Right to appeal against penalty**
> A person may appeal against any of the following decisions of an officer of Revenue and Customs–
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
> (b) a decision as to the amount of such a penalty.
>
> **Paragraph 48 – Procedure on appeal against penalty**
> (1) Notice of an appeal under paragraph 47 must be given–
> (a) in writing,
> (b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and
> (c) to HMRC.
> (2) Notice of an appeal under paragraph 47 must state the grounds of appeal.
> (3) On an appeal under paragraph 47(a) that is notified to the Tribunal, the Tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b) that is notified to the Tribunal, the Tribunal may–
(a) confirm the decision, or
(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.
(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

33. Part 5 TMA 1970 contains the procedure for a statutory review of an HMRC decision. Pursuant to section 49F, HMRC's conclusions of the review are treated as an agreement under s54(1) TMA 1970 unless the appellant (validly) notifies the appeal to the Tribunal:

"**Section 49F— Effect of conclusions of review**
(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).
(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.
(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.
(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the Tribunal under section 49G."

34. Section 49G TMA 1970 provides for appeals to be notified to the FTT:

**"Section 49G— Notifying appeal to Tribunal after review concluded**

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

…

(2) The appellant may notify the appeal to the Tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the Tribunal only if the Tribunal gives permission.

(4) If the appellant notifies the appeal to the Tribunal, the Tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or…"

35. Section 54(1) TMA 1970 provides that, where HMRC and an appellant have come to an agreement, the decision under appeal is treated as upheld without variation or as varied accordingly and the like consequences shall ensue for all purposes as would have ensued if the Tribunal had determined the appeal:

> "**Section 54— Settling of appeals by agreement**
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the Tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> …"

***The Facts***

36. Over a long period of time HMRC was in correspondence with the Respondent, through his accountants, Leigh Carr, regarding his connection, involvement or interest in the Taj Trust. The nature of the enquiry is addressed below in our consideration of the third statutory condition.

37. Following HMRC's unsuccessful attempts to obtain information in relation to the Taj Trust, HMRC applied (pursuant to paragraph 3(2) Sch 36) to the FTT for approval for the giving of a taxpayer information notice to the Respondent. The Respondent was invited to make representations but did not do so.

38. On 28 August 2019, the FTT approved the Information Notice (with certain amendments). The requirements set out in the Information Notice were as follows:

> "Please provide the following [in] respect [of] the period 06 April 2013 to 05 April 2017.
>
> 1. In respect of The Taj Trust, please provide;
> (a) A copy of the Trust deed,
> (b) A copy of any Letter of Wishes,
> (c) A copy of the trust accounts covering the period 06 April 2013 to 05 April 2017 inclusive.
> 2. Copies of all correspondence between you and the trustees of The Taj Trust, including all letters, e-mails and notes of telephone calls.
> 3. Particulars of all transactions between you and the trustees of the Taj Trust, to include the date, amount and description of all transactions.
> Transactions covered by this request should include, but are not limited to, loans, payments, distributions and any other transfer of money, shares or other assets between you and the Trustees.
> 4. Copies of all correspondence between you and Mr Nigel Carter, including all letters, e-mails and notes of telephone calls, relating to the property

> purchases, refinancing of and disposals by entities directly or indirectly owned by the Taj Trust."

39. The deadline for compliance with the Information Notice was extended to 23 October 2019 by agreement with HMRC. However, the Respondent did not (and still has not) provided any of the information or documents requested in the Information Notice.

40. On 24 October 2019, Leigh Carr responded to HMRC by email stating:

> "With regard to the notice dated the 28 August 2019; we reiterate what we have told you in our letter of 3 July 2018, that any matter relating to the Taj Trust should be addressed to Nigel Carte of Landmark Management S.A, 6 Place des Eaux-Vives, PO Box 3461, 1211 Geneva 3, Switzerland.
> Mr S Mattu does not hold any details relating to the Taj Trust."

41. Since the Respondent had not provided the information and documents requested under the Information Notice by the extended deadline of 23 October, on 24 October 2019 HMRC issued a penalty under paragraph 39 Schedule 36 FA 2008 in the sum of £300.

42. HMRC received an appeal against the Paragraph 39 Penalty (under paragraphs 47 and 48 of Sch 36) from the Respondent's representatives on 31 October 2019 (within the time limit contained in paragraph 48(1)(b)). The letter stated:

> "We refer to your letter of 24 October 2019 and reiterate what we have said in our letter of 3 July 2018 and email of 24 October 2019. We again state that matters relating to the Taj Trust should be addressed to Nigel Carter of Landmark Management SA, 6 Place de EAUX- VIVES, PO Box 3461,1211 Geneva 3, Switzerland. Our client does not hold any copies of Trust Deeds etc mentioned in your letter.
>
> Please accept this letter a formal notice of appeal in regard to the penalty notice."

43. On 7 November 2019, HMRC issued a "view of the matter" letter to the Respondent and offered the Respondent a statutory review of the decision. Pursuant to paragraph 48(5) of Sch 36 FA, the provisions of Part 5 TMA 1970 relating to appeals (and reviews) have effect in relation to appeals under paragraph 47. Therefore, the review offer was made under s 49C TMA 1970.

44. On 15 November 2019, the Respondent accepted the offer of a statutory review of the Paragraph 39 Penalty. The letter stated:

> "In your schedule 36 Notice you have requested specific information in relation to the TAJ Trust e.g. trust deeds, letter of wishes and accounts which our client Mr S. Mattu does not have.
>
> We do not understand how the two emails you have sent to us has any relevance to the specific information you have requested.

> We have stated on numerous occasions dating back to 3 July 2018 that the specific information you have requested should be requested and addressed to Mr Nigel Carter of Landmark Management."

45. On 16 January 2020 HMRC issued their Review Conclusion letter which upheld the Paragraph 39 Penalty.

46. Pursuant to s 49G2 TMA 1970, the Respondent was entitled to notify his appeal to the FTT within the "post-review period" being within the period of 30 days beginning with the date of the document in which HMRC have given notice of their review conclusion, which would have been 14 February 2020.

47. On 25 February 2020 HMRC wrote to the Respondent, copied to Leigh Carr, in the following terms:

> "Dear Mr Mattu
> Further to HMRC's Review Conclusion Letter issued on 16 January 2020.
>
> I am writing to make you aware that as HMRC issued the Penalty Notice on 24 October 2019 and the information and documents requested in the notice issued on 28 August 2019 have yet to be provided. HMRC will be looking to issue daily penalties on 05 March 2020 on the basis that you have failed to comply with an information notice."

48. On 28 February 2020 Mr Sanfilippo of Leigh Carr emailed a reply to this letter in the following terms:

> "We refer to your letter of the 25 Feb 2020 and confirm that we have sent in a notice of appeal to the FTT."

49. Mr Sanfilippo gave evidence concerning the notice of appeal against the Paragraph 39 Penalty. In his witness statement he suggested it was sent on 14 February 2020. In his oral evidence to us he confirmed that he did not actually post the letter himself. He exhibited a notice of appeal to the FTT (form T240) which had been completed in handwriting, signed by the Respondent and was dated 14 February 2020. Section 16 of the form ("Why are you late or might be late, with your appeal to the tax Tribunal?") was left blank.

50. Mr Sanfilippo stated in oral evidence that the Respondent had come into the office that day and had a conference regarding HMRC's enquiry and signed the notice of appeal. Mr Sanfilippo stated that he did not send the notice by recorded delivery but sent the letter "downstairs" for collection on that day. He said "I was pretty sure it went recorded but I need to look for myself when I am back in the office, however the secretary has no record of it on her Post Office Book so I assume it went standard post."

51. In fact, the FTT confirmed that the appeal notice was received by the FTT on 24 February 2020 (i.e. 10 days late) so that the appeal was out of time. The FTT returned the form T240 by post to the Respondent on 9 March 2020 as being invalid or incomplete.

52. On 5 March 2020 Officer Jackson issued a penalty notice for daily penalties of £5,280 under paragraph 40 of Schedule 36 FA 2008 (at £40 per day for 132 days for the period 25 October 2019 to 4 March 2020).

53. On 13 March 2020, HMRC issued two Discovery Assessments to the Respondent for tax years 2013-14 and 2015-16.

54. In an email to HMRC dated 14 April 2020, in reply to a notice of assessment issued by HMRC on 13 March 2020 for the year ending 5 April 2016, Mr Sanfilippo stated:

> "As you were aware we did send in a notice of appeal in February regarding the Sch 36 penalty but yet have not received any reply by the FTT. As this forms the basis of your assessments dated 13 March 2020, we hereby make a formal appeal.
>
> With regard a response to your letter dated 5 March 2020, Mr Ralph de Souza is as you know had chronic issues with his health…. Under current advice from his Doctors and NHS Guidelines he is considered vulnerable and must be in self isolation for 12 weeks in this pandemic we are all experiencing. Therefore I would be grateful if you can give us an extension to the 30 June 2020 to answer all your queries and questions."

55. The Respondent's continued non-compliance led to further daily penalties being assessed by HMRC under paragraph 40 Sch 36. The additional penalties were assessed on 15 May 2020 in the sum of £4,200 (at £60 a day for 70 days for the period 5 March 2020 to 13 May 2020).

56. On 11 June 2020 Mr Sanfilippo emailed Mr Jackson explaining:

> "Further to your email of the 15 May we appeal against the further daily penalties in regard to the information notice of the 28 August 2019.
> As mentioned to you previously we have sent a notice of an appeal to the First Tier Tribunal in the post in February. We have a copy of the Notice sent to the FTT but unfortunately my scanner at home does not work properly otherwise I would have scanned you a copy. Is there any way to contact FTT to see where they are at with it please?
> With regard to your letter of the 5 March, can we kindly seek an extension to the 31 July 2020. As you know Ralph de Souza is considered extremely vulnerable and has only just be allowed under Government Guidelines to leave his home after almost 12 weeks of isolation."

57. On 12 June 2020 Leigh Carr sent HMRC a copy of the Notice of Appeal (form T240) that had been sent to the Tribunal.

58. Officer Jackson checked the status of the appeal with HMRC's Tribunal Services Clearing House who checked the status of the appeal with the FTT which confirmed that the appeal had been incomplete because it was out of time and did not provide reasons for being late, and therefore there was no live appeal in relation to the Paragraph 39 Penalty.

59. Officer Jackson informed Leigh Carr of this on 15 June 2020 by email:

> "I have had a response from our Clearing House and have copied their response below in respect of your appeal to the Tribunal:
>
> The TC ref was TC/2020/01017 but was never served on HMRC as it had to be returned to the appellant as incomplete. It was received on 24/2/20 by Tribunal and returned on 6/3/20 to the appellant as the application was incomplete. It was out of time and they didn't provide late reasons or notice of Appeal.
>
> Therefore, there is no live Appeal for this case."

60. On 17 June 2020, a further email was received by HMRC from Leigh Carr appealing the daily penalties notice dated 5 March 2020 on the following grounds:

> "Again we appeal on the grounds that The Respondent cannot obtain information in regard to the Taj Trust. As stated on page 7 of the Notice of Appeal to FTT, The Respondent is a businessman, he does not understand the technicalities of trust law and what they mean, referring to the email correspondence from the solicitor stating that there is an additions of beneficiaries document. Matters relating to the Trust should be referred to Nigel Carter of Landmark Management SA."

61. Throughout June and July 2020 Leigh Carr corresponded with HMRC regarding seeking a review of the daily penalties imposed under paragraph 40 of Sch 36 on 5 March 2020 and 15 May 2020. The penalties were upheld on review. An appeal was made to the FTT against the daily penalties on 21 September 2020 which was made after the expiry of the relevant time limit but was accepted by HMRC. The Respondent has notified his appeals against the daily penalties to the FTT and those appeals are stayed pending the outcome of the present proceedings.

***Discussion and Decision***

62. Mr Firth submitted that the first statutory condition had not been satisfied for the following reasons:

> (1) Given that the notice of appeal is dated 14 February 2020 and ticks the box to say it is in time, Leigh Carr say it was sent on a Friday within the 30-day period (14 February was a Friday) and the prior procedural steps had been dealt with in good time, this evidence should be accepted.
>
> (2) Under Rule 13 of the FTT Rules, a document may be provided to the FTT by being "sent by pre-paid post…to the address specified". Based on that rule, the document was provided on 14 February 2020, which was in time.
>
> (3) Accordingly, the FTT was wrong to "return" the notice of appeal, if that is what happened. It received a valid appeal and was required to determine it in accordance with the FTT rules.
>
> (4) Additionally, even if an appeal is notified outside the normal time limit, there is no basis for the Tribunal to "return" the appeal and treat it as if it was

never submitted. Treating an appeal as never having been submitted if it does not contain the request for permission to appeal late is unnecessary and unwarranted.

(5) As a matter of law, the appeal has been notified, the clock stops running and if the FTT administrative staff take the view (contrary to the view of the appellant) that it is outside the statutory time limit, that is a point that can be raised with the parties and dealt with accordingly.

(6) Even if an appeal is clearly out of time the relevant box 16 has not been completed to say so, the correct course is not to return the appeal and treat it as if was never made. Instead, the FTT can issue directions as to how the matter must be dealt with if the appellant wishes to continue (most likely an application to amend the notice of appeal). In this respect, Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("the FTT Rules") applies if a notice of appeal is "provided after the end of any period specified…". It provides that the notice of appeal should include a request for permission to appeal late but does not prescribe the consequence of non-compliance. There is no basis for taking the "nuclear" option of treating the appeal as never sent and such an approach would be inconsistent with the overriding objective.

(7) Therefore, liability to a Paragraph 39 Penalty had not been established at the time the application for a Paragraph 50 Penalty was made, and still has not. Accordingly, no penalty under Paragraph 50 can be imposed and the application must be dismissed. There is no jurisdiction to consider the other matters.

(8) Any concern that the above result might be considered fortuitous to the Respondent in the present circumstances must be balanced against the fact that he/his representative plainly did seek to have his reasonable excuse tested before the FTT and he has been denied the opportunity to consider how his behaviour needs to be modified in light of the required FTT ruling on that matter. That is the graduated response to alleged non-compliance that Parliament has mandated.

63. We reject these arguments.

64. We are satisfied that the notice of appeal against the paragraph 39 penalty was not sent to the FTT on 14 February 2020 within the required time period of 30 days from HMRC's review conclusion letter of 16 January 2020.

65. We reject Mr Sanfilippo's evidence that the notice of appeal was sent on Friday 14 February 2020 for the following reasons.

66. First, he did not witness it being sent by post or recorded delivery. There is no record of any recorded delivery or courier being used by the Respondent to deliver the notice of appeal, nor is there any evidence from any other person at Leigh Carr who may have posted the notice. No office records have been provided as to when the letter was sent. In his email dated 28 February 2020 Mr Sanfilippo simply confirmed that the notice of appeal had been sent to the Tribunal without confirming the date on which it was sent.

67. In his evidence Mr Sanfilippo had stated that the notice of appeal was sent by first class post rather than recorded delivery, despite it being dated on the final day within the 30-day period following the review letter dated 16 January 2020.

68. This is to be contrasted with the letter sent to HMRC and dated on the same day (14 February 2020) from Mr Ralph de Souza, the partner in Leigh Carr responsible for Mr Respondent's tax affairs. The copy provided to us of Mr De Souza's letter dated 14 February 2020 has a recorded delivery type of receipt posted on its top right hand corner. The contents of that letter also refer to providing track and trace receipts for an earlier letter dated 25 November 2019 as an appendix.

69. Second, Mr de Souza's letter of 14 February 2020 addresses related topics to HMRC's enquiry including that of the Taj Trust to HMRC. Despite it being sent to HMRC on the same day, it makes no mention that the Respondent was or would be lodging a notice of appeal against the penalty to the FTT that same day. This omission is noteworthy given that Leigh Carr was sending a letter to HMRC and purporting to notify an appeal to the FTT on the same day.

70. Third, the notice of appeal was only received by the FTT on 24 February 2020 some ten days later and outside the 30-day time period. The Tribunal confirmed by email to Officer Jackson that it was received on 24 February 2020, rather than simply that it was processed on that day but may have been received at an earlier time.

71. In the ordinary course of events, it is likely that a document sent by first class post on 14 February 2020 (and all the more so, by recorded delivery) would have been received at an earlier time than 24 February 2020 (some ten days later). Therefore, it is likely that the notice of appeal, despite being dated 14 February 2020, was not sent to the FTT until Monday 17 February 2020 at the earliest (outside the 30 day time period).

72. Furthermore, we are satisfied that the proper interpretation of "notify an appeal to the Tribunal" for the purposes of s 49G(2) TMA 1970 means that the FTT must receive the appeal (and do so within the requisite time period, in this case 30 days). The word 'notify' is to be contrasted with 'served' or 'sent' which appear both in TMA 1970 and the FTT Rules.

73. We are satisfied that to "notify" an appeal to the Tribunal does not simply mean to "send" a notice of appeal. Reference to the time period in which it must be notified is to the time by which it must be received rather than simply sent. As a matter of the ordinary or natural meaning of the language, a person cannot notify or give notice of something to another person until it is received by them. An appeal which is never received but only ever sent does not provide notice. As a matter of practice, it would lead to administrative uncertainty if the FTT was required to accept and process appeals as being made in time if they are received long after the decision appealed and well outside the time period for notification even if they have been sent within that time.

74. Such an interpretation is consistent with the statutory scheme in sections 48-49I TMA 1970 in which reference is consistently made to notifying an appeal and giving notice of appeal to HMRC or the Tribunal. For example, s 49A provides:

> "(1)This section applies if notice of appeal has been given to HMRC.
>
> (2)In such a case—
>
> (a)the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
>
> (b)HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
>
> (c)the appellant may notify the appeal to the Tribunal (see section 49D).
>
> (3)See sections 49G and 49H for provision about notifying appeals to the Tribunal after a review has been required by the appellant or offered by HMRC."

75. The actions consequent on an appeal being notified to HMRC or the FTT can only take place if the appeal has been received by them. "Notice requires communication and involves more than the despatch of the relevant documents" per Edward Jacobs at para 7.163 of Tribunal Practice and Procedure, LAG, Fifth edition. See also the judgment of Russell LJ in *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 at 158:

> "But the requirement of "notice ... to", in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to by Anson as "acceptance without notification"".

76. There is no injustice in such interpretation of the meaning of "notify" because at all times the FTT has the discretion to accept late appeals and the taxpayer has the opportunity to provide a reason for lateness in the notice of appeal being received or, even the absence of receipt, in correspondence with the FTT thereafter. The FTT will then apply the principles set out in *Martland v HMRC* [2018] UKUT 0178 (TCC) when deciding whether to admit a late appeal.

77. Therefore, even had we accepted that the notice of appeal (form T240) had been posted at some point on Friday 14 February 2020, contrary to our findings of fact, it would not have been notified to the FTT on that day. In the ordinary course of posting it would not have arrived until Monday 17 or Tuesday 18 February 2020, which would have been outside of the "post-review period".

78. Section 115 (2) of TMA 1970 provides that any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to

be given, sent, served or delivered to or on any person by HMRC may be so served. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document be served by post… then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

79. In conclusion, considering the underlying evidence (set out above), we are satisfied the Respondent failed to notify his appeal to the FTT within the 'post-review period' prescribed in s 49G TMA 1970 by 14 February 2020. We are satisfied that the Respondent, or his agent, did not send the notice of appeal until after 14 February 2020.

80. Further or alternatively, contrary to our finding, even if the Respondent or his agent had sent the notice of appeal on 14 February 2020, we are not satisfied that he notified the appeal on this date because the FTT did not receive the appeal until 24 February 2020.

81. Accordingly, the Respondent had no right to notify his appeal to the FTT after the end of the "post-review period" and could do so "only if the Tribunal gives permission" (s 49G(3) TMA 1970). The FTT has not given permission, primarily because the Respondent never sought permission and has not given any reasons as to why permission should be granted. Accordingly, the evidence demonstrates that the FTT was correct to reject the attempt to appeal against the Paragraph 39 Penalty and there is no 'live' appeal against that penalty.

82. The Respondent has not sought to pursue his appeal against the Paragraph 39 Penalty since June 2020 despite being made aware that it had not been accepted. There was no attempt by the Respondent or Leigh Carr to correspond directly with the FTT, or dispute the conclusion that the appeal was notified late, let alone seek permission for the appeal to be admitted late.

83. Furthermore, regardless of whether or not the FTT was correct (on the facts) to reject the appeal, it has taken a decision to do so and has decided that the appeal was notified late (and has not granted permission for the appeal to be notified late).

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

85. The Respondent had the right to make a written application to the FTT under Rule 4(3) of the FTT Rules for the decision to be considered afresh by a judge: see Rule 4 of the FTT Rules. Alternatively, the Respondent could have appealed against the decision. In the absence of a challenge, the decision of the FTT that the Respondent failed to notify his appeal against the Paragraph 39 Penalty within the relevant time limit and therefore failed to make a valid appeal is binding.

86. An administrative act (i.e. decision of a public body) is treated as valid unless and until it is successfully challenged before a court of competent jurisdiction (at which time it will generally be recognised as having had no legal effect): for example, *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 at [365]:

> "Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed."

87. For the avoidance of doubt, the Respondent also refers to his liability to daily penalties under paragraph 40 of Sch 36. However, the imposition of such penalties, and any appeals against them, have no bearing on the imposition of a penalty under paragraph 50 - see *Tager v HMRC* [2015] UKUT 0040 (TCC) at [39]:

> "The imposition of a penalty in accordance with para 50 is not dependent on the prior imposition of daily penalties, whether in accordance with para 40 or para 49A (and the wording of para 50(5) indicates that a person may not be subject to penalties under both para 49A and para 50), but only on the prior imposition of a 30 penalty in accordance with para 39—that is, the initial £300 penalty which is incurred for even a minor failure of compliance."

88. Given that no (in time) appeal was made to the FTT and no application to bring a late appeal has been made, the appeal is treated as settled by virtue of s 49F and s 54(1) TMA 1970. The consequence of the settlement is that it is deemed that the FTT had determined the appeal and had upheld the Paragraph 39 Penalty, and "like consequences shall ensue for all purposes".

89. No application has been made by the Respondent to make a late appeal or a challenge to the FTT's decision that the paragraph 39 penalty appeal was late to be made at this stage. Even if the Respondent had a reason for failing to appeal late following the initial rejection of the appeal by the FTT, since 15 June 2020 (i.e. over a year ago) he has evidently been aware that his appeal was rejected but has taken no steps to make an application to bring a late appeal or to challenge that decision. That delay is significant and there is no good reason for it. In any event, no such application/challenge has been made as at the date of the application for the Paragraph 50 Penalty, the hearing of that application and this determination.

90. The consequence of the Respondent's argument that the FTT has exclusive jurisdiction to determine liability to a penalty under paragraph 39, and the fact that there is not presently a "live" appeal against that penalty and/or it is deemed that there has been a determination of that appeal, is that all matters relevant to the imposition of the penalty under paragraph 39 have been determined (or are deemed to have been determined).

91. It is therefore unnecessary for the Upper Tribunal in the present proceedings to consider matters that would have been relevant to any appeal against the Paragraph 39 Penalty, such as whether or not the Respondent had a reasonable excuse or whether the information/documents sought were within his power or possession. Indeed, according to the Respondent, the Upper Tribunal has no jurisdiction to consider these issues as they fall within the exclusive jurisdiction of the FTT.

92. Further, if the Upper Tribunal does have jurisdiction in relation to issues that could have been raised in an appeal against a paragraph 39 penalty, in the present case it would be an abuse to allow the taxpayer to raise arguments that could have been raised in the appeal against the Paragraph 39 Penalty.

93. We accept HMRC's submission by analogy to the reasoning of the FTT in *Spring Capital v HMRC* [2016] UKFTT 0232 (TC) at [36]-[45]. In that case, the taxpayer had previously appealed against the imposition of a penalty under paragraph 39, and the appeal had been dismissed, which decision included a finding that the information notice was valid (in particular that certain information requested was reasonably required) (see [3] and [35]). In the further appeal against daily penalties (under paragraph 40), the taxpayer again tried to challenge the validity of the information notice. The FTT accepted that it might have jurisdiction to consider this issue but held that it was an abuse of process in circumstances in which the validity of the notice had already been determined in the appeal against the paragraph 39 penalty. By analogy, where an appeal has been made and has been treated as determined by the FTT (which would necessarily include a finding that the Respondent did not have a reasonable excuse for the failure to provide the information/documentation requested), it would be an abuse to allow him the opportunity to raise the argument again in proceedings under Paragraph 50.

94. Finally, and in any event, we set out below our finding that the Respondent had no reasonable excuse for failing to comply with the information notice at any relevant time. We have made those findings because the issue is relevant to the questions raised under Paragraph 50(1)(e) and (2) of Paragraph 50 of whether it is appropriate for the Upper Tribunal to impose an additional penalty and the amount of the penalty.

**Second statutory condition for the imposition of a penalty - Paragraph 50(1)(b): the failure or obstruction continues after a penalty is imposed under paragraph 39 of Sch 36**

***The Respondent's case on the second statutory condition***

95. No positive case was advanced in the Respondent's skeleton argument as to whether the Respondent had in fact complied with the Information Notice nor what the Respondent's reasonable excuse for failing to comply with the Information Notice might be nor why the information and documents sought by HMRC in the Information Notice are not within his "possession or power" (within the meaning of paragraph 18 of Sch 36).

96. During the hearing Mr Firth made the following submissions:

(1) The Respondent had consented to a third-party information notice being issued against Lawrence Stephens, the solicitors who acted for companies connected with the Respondent on various property transactions. HMRC inspected these documents over two days at the solicitors' premises and uplifted a large number of documents upon which they now rely, including and importantly, a copy of the trust deed for the Taj Trust. Therefore, the Respondent had not obstructed HMRC but rather gave consent and access to the most relevant documents.

(2) Mr Firth submitted that there had been serious non-disclosure by HMRC of the documents made available to HMRC from Lawrence Stephens solicitors under the third-party notice with which they had voluntarily complied. He submitted that Officer Jackson had failed to record in his witness statement that HMRC had taken two days to inspect all the documents held by the solicitors and to which the Respondent had consented to access. He submitted that HMRC had cherry picked only a small selection of documents to rely upon as exhibits to Officer Jackson's witness statement. However, Mr Firth submitted that there may have been a range of other information and documents made available to them which would or might well have answered their queries but which HMRC had failed to record or disclose.

(3) The Respondent acted reasonably where he did not personally hold information or documents by directing HMRC to Mr Carter and other professionals whom he reasonably believed held the relevant information required under the Information Notice.

97. In his witness statement the Respondent stated:

> "3. On or about 28 August 2019 I received an information notice from Jordan Jackson of HM Revenue and Customs ("HMRC") requesting various information in connection with the Taj Trust (enclosed at pages 1 to 3).
>
> 4. As is my practise with all matters beyond the purely administrative (such as request for copies of ID documents) I passed this information notice to Leigh Carr, my accountants, to deal with. I verbally instructed Leigh Carr to provide the information requested.
>
> 5. I expected Leigh Carr to engage with the Trustee of the Taj Trust, namely Landmark Fiduciary Company Limited (the "Trustee") in order to secure the required information.
>
> 6. I understand from Leigh Carr that they made efforts to do so albeit the laws and regulations governing the Taj Trust and the Trustee meant that they could not be provided with the required information (as they did not act for the Trustee). As such, HMRC were required to engage with the Trustee directly.
>
> 7. I do not have any correspondence with the Trustee of the Taj Trust beyond what is already in the possession of HMRC.
>
> 8. Furthermore, I did not hold or control the other information requested. I understand this information is held by the Trustee."

98. It therefore appears from Mr Firth's submissions and the evidence given by the Respondent that the key points on which the Respondent relies is that he did not have possession or power of the information and documents requested by HMRC in the Information Office, as set out at [38] above and in relation to those documents which were within his power he gave access to them to HMRC by the authority he gave to his solicitors.

***Relevant law - possession or power***

99. The requirement in paragraph 18 of Sch 36 that items must be in the possession or power of the recipient of the notice strictly applies only to documents and not to information. However, HMRC accepted that similar principles apply to the provision of information, namely that the recipient must provide information within their possession (i.e. knowledge) as well as information which is within their power.

100. HMRC accepted that, whilst they strictly have the burden of proof, in an issue of this type it is sufficient for HMRC to raise a prima facie case that the documents and information are in the Respondent's possession or knowledge and then it is for the Respondent to show that they are not. As the FTT said in *HMRC v Parissis* [2011] SFTD 757 *("Parissis")* at [19] in relation to the predecessor legislation to Sch 36, which is in identical terms on this point:

> "It seems to us that it is HMRC's application for a penalty and it is for them to satisfy us that the documents are in the respondents' possession or power. We bear in mind it is hard to prove a negative. But, we think, although HMRC must raise a prima facie case that the documents are in the respondents' possession or power then it is for the respondents to show that they are not."

101. The term "power" means both legal power and de facto power to obtain documents (or information). We gratefully adopt what the FTT said in *Parissis* on this point. In that case, HMRC had requested various documents (including trust accounts) from the taxpayers in an information notice and the FTT held that, since the taxpayers were the settlors and beneficiaries of the trust, the trustee was a professional trustee, and there had been cooperation and direct transactions (loans) between the trustee and the taxpayers, it was likely that the trustee would choose to provide the documents sought. The FTT therefore held that HMRC had raised a prima facie case that the documents were in the power of the taxpayers. At [78]-[82] the FTT stated:

> "[78] De facto or practical power did not arise in *Lonrho* as the defendants in that case had asked the owners of the documents sought for their production and been refused. The documents were not in Shell's de facto power. In any event, the Lords in Lonrho did not consider that being able in practice to obtain a document, perhaps by influence, was enough for it to be within the person's 'power'. Not only did the Lords require a presently enforceable legal right to the documents to exist but they said it must be exercisable without another person's consent. HMRC are asking us to find that a document may be within a person's power for s 20 purposes even if they do need the consent of another person. 'De facto' power would cover documents (1)–(7) in that the

> trustee possesses them and (in HMRC's view) would produce them on request to the settlor and beneficiaries.
>
> [79] Could documents be within the respondents' power if they have to get the consent of another person (in this case the trustee) in order to obtain them? It costs very little to ask. We consider, in the context of information notices where the emphasis is on the present and future, and contrary to the conclusion reached in *Lonrho* in the context of disclosure for litigation where the emphasis was on the present and past, that documents are within a person's power if they can obtain them, by influence or otherwise, and without great expense, from another person even where that person has the legal right to refuse to produce them.
>
> [80] So the question is then is it for HMRC to show that the trustees certainly would hand over the documents if asked or for the respondents to demonstrate they have asked the trustees and been refused?
>
> [81] HMRC have raised a prima facie case that the respondents would be given the documents by the trustees: they are both settlors and beneficiaries. The respondents, we find, transferred some of their wealth to the trustee on trust for themselves. We find they were unlikely to do this if they did not believe that the trustee would act on their instructions. The trustee is a professional trust company and will have a reputation to maintain. The trustee has made loans to the beneficiary. From what little evidence we were given, we find the trustee co-operated in the sale of the business. Even if not obliged in the absence of a court order to provide documents (1)–(7), we find it is likely a trustee would choose, in the spirit of trusteeship, to provide copies of them to the settlors and beneficiaries.
>
> [82] HMRC have raised a prima facie case that the documents are within the power of the respondents and we therefore think it is for the respondents to show that they have asked the trustee for the documents and been refused. They have not done this. They are therefore liable to a penalty."

102. See also, *H A Patel & K Patel (a partnership) v HMRC* [2014] UKFTT 167 (TC) in which the taxpayers claimed that the documents requested in an information notice were not in their possession or power, but were within the possession of the professional offshore trustee. The FTT held at [14]-[16] that the taxpayers must have power to influence the behaviour of the trustee and that a single request and refusal (with no attempt to follow up the request) did not constitute any serious attempt to obtain the relevant information from the trustee, such that it could not be concluded that the information/documents were not in the taxpayers' possession or power.

### *The Facts*

103. We take into account the fact that the Respondent did not give oral evidence and was not cross examined on his witness statement. However, even if we were to accept the evidence he gave within that statement, we are not satisfied that it establishes that the information and documents requested in the Information Notice were not in his power or possession or that he had a reasonable excuse for not obtaining them or attempting to obtain them. In effect, the Respondent unreasonably attempted to

delegate his personal responsibility by deflecting HMRC and diverting them to contact others to obtain the information and documents rather than attempting to obtain them himself.

104. The information and documents sought from the Respondent under the Information Notice fall into three main categories:

(1) Documents relating to the Taj Trust.

(2) Correspondence: all correspondence between the Respondent and the trustee of the Taj Trust ("the Trustee") and all correspondence between the Respondent and Mr Carter relating to property purchases, disposals and refinancing by entitled owned directly or indirectly by the Taj Trust; and

(3) Information (particulars) in relation to all transactions between the Respondent and the Trustee.

We shall deal with each of these categories in turn.

*Trustee Documents*

105. Although it is not clear whether under the law governing the terms of the Taj Trust there is a specific legal obligation to keep proper trust accounts, there is no suggestion in the documents that we have seen that the Trustee does not keep proper trust accounts, as would be expected of a professional trustee in order to comply with their legal obligation to account to the beneficiaries on the financial matters relating to the trust. HMRC have obtained nominal ledgers from the Panamanian tax authorities. However, whilst these ledgers are very detailed prior to 2009 they are evidently incomplete as there is not a single transaction recorded after 2009.

106. There is good evidence that the Respondent has the ability to obtain documents from the Trustee when it is of assistance to him. The following examples are sufficient to establish this.

107. There is a letter dated 4 June 2021 from Mr Carter, the contact at the Trustee in Switzerland, to Mr Sanfilippo in which information relating to loans from the Respondent to the Trust has been provided, for example that the loans are at "commercial rates" but not stating what the rates are or how much interest has been paid (which would in principle be subject to UK income tax). In that letter the Trustee also appears to indicate that they are content to provide information to HMRC provided that it is otherwise kept confidential. The letter says:

> "We understand that this letter will be disclosed to HM Revenue and Customs, otherwise the information contained in this document is confidential and only for the intended recipient and may not be used, published or redistributed without the prior consent of Landmark Fiduciary Company Limited".

108. In June 2021 Mr Carter wrote to the Tribunal seeking to provide information in relation to the Trust for the purposes of the present proceedings. In addition, Mr Ian Ledger, another representative of the Trustee was willing to provide evidence to the

Tribunal for the purposes of these proceedings on the information requested by the Information Notice. His witness statement dated 21 June 2021 was not admitted for the reasons given by Judge Herrington in his decision dated 24 June 2021, as described in the Appendix to this decision, but the fact that at this late stage these individuals were prepared to provide answers to some of the questions asked by HMRC is strong evidence that the Respondent had the power to ask the Trustee to provide the relevant information.

109. In cross-examination, Mr Sanfilippo accepted that Mr De Souza, the senior partner of Leigh Carr, was able to contact the Trustee to obtain information (and had done so).

110. There is also the email from James Murden of the Trustee to the Respondent attaching a copy of an instrument excluding beneficiaries from the Taj Trust, to which the Respondent responded thanking Mr Murden for providing the documents.

111. The availability of the Trust Deed constituting the Taj Trust is illustrative: the Respondent failed to provide a copy of that Deed, however HMRC were subsequently able to obtain copies from Lawrence Stephens, which as we have explained, were the solicitors who acted in property transactions concerning companies of which the Respondent is a director (such that he would be able to request copies of those documents). There is no substantive evidence that the Respondent even tried to obtain that document from the Trustee or from any other person.

112. There is also no substantive evidence that the Respondent has contacted other professionals who have acted on property transactions such as Rainer Hughes or C&G Solicitors.

113. As sole beneficiary of the Trust, the Respondent has a right to obtain disclosure of trust documents. For example, as stated in *Lewin on Trusts* at 21-031:

> "It is the bounden duty of a trustee to keep clear and distinct accounts of the property he administers, and to be constantly ready with his accounts".

It has not been suggested by the Respondent that these principles do not apply in relation to the Taj Trust.

114. Finally, in his witness statement the Respondent states that he instructed Leigh Carr to obtain the information requested in the Information Notice and "expected" them to engage with the Trustee of the Taj Trust. He does not state that he has personally made any efforts at all to obtain the information sought by HMRC.

*Correspondence*

115. The evidence before the Tribunal includes some email correspondence to which the Respondent and Mr Carter are parties, which HMRC have obtained from other sources but which the Respondent has not sought to provide himself.

116. For example, on 29 April 2014 the Respondent replied to Mr Bernstein of Lawrence Stephens confirming that he "own[s] everything" in the Taj Trust, an email

that was copied to Mr Carter. In his email of 30 April 2014 to the Respondent attaching a copy of the Instrument of Exclusion of Beneficiaries Mr Murden states "should you require anything further please do not hesitate to contact me." In our view, it is highly likely that there has been considerable communication between the Respondent and the Trustee given that, as disclosed by Mr de Souza of Leigh Carr at a meeting with HMRC on 27 March 2018, Mr Carter acted as the Respondent's mentor.In addition, Leigh Carr's letter of 3 July 2018 to HMRC also refers to contact between Mr Carter and the Respondent. In referring to Normandy Group Limited, one of the companies owned by the Taj Trust, the letter states that "Mr Carter contacts Mr Mattu so as to know the health of the business. [The Respondent] liaises with Mr Carter who visits the UK for a day or two twice a year."

117. The suggestion that the Respondent has no correspondence beyond that already within the possession of HMRC, as Mr Sanfilippo said was the case in his evidence, is inconsistent with the evidence before the Tribunal. It is also not credible in light of the fact that the Respondent has made this claim at various stages when he would not have known what correspondence was in HMRC's possession.

*Information relating to transactions*

118. Since there is no barrier to such information being provided by the Respondent, the only issue is whether such transactions occurred. There were multiple examples in the evidence.

119. First, a loan by Mr Carter (director of Landmark, the group that provides the Trustee of the Taj Trust) in an email to the Respondent on 12 January 2015, in respect of which the interest was £20,000 as at 13 June 2016, with further payments of £2,500 per month being made thereafter by the Respondent. In cross-examination, Mr Sanfilippo sought to explain away the Respondent's failure to disclose details of this transaction on the basis that it was "only" £20,000.

120. Second, a loan made by Jazz Dulay to the Respondent, of which £250,000 was transferred to Mr Carter. It also appears from this email chain that this loan was repaid using funds held by Chartwell Asset Management Ltd, another company held through the Taj Trust. It is also noteworthy that the funds appear to be paid to and from the accounts of Lawrence Stephens rather than through the Respondent's personal bank account. This suggests that records of the Respondent's bank accounts are insufficient to show the transactions in which he is involved and specific information in relation to all transactions is required.

121. Third, significant loans have been made by the Respondent to the Taj Trust which bear interest at 2.5% per annum from 6 April 2017. This is confirmed by the Respondent's witness statement where he accepts that he has lent the Taj Trust money at market rates.

122. Fourth, in relation to the purchase of the Wakerley Centre in March 2014, the contract was exchanged in the name of Frisco Limited, a company owned by the Respondent personally (i.e. not owned by the Taj Trust) and the property was then

transferred (or the right to purchase assigned) to Frisco Capital Limited, a company owned by the Taj Trust and incorporated in the Seychelles.

123. It is accepted that this transaction and the one described in the next paragraph are strictly between the Trustee (and entities owned by the Trustee) and a company owned by the Respondent, and there is therefore an argument that these transactions fall outside the scope of the Information Notice. However, as HMRC submit, transactions concerning a company owned by the Respondent, and of which he is director, would constitute "Particulars of all transactions between you and the trustees of the Taj Trust".

124. Fifth, another property was purchased on 9 July 2014 by Hembrook Limited a company formed and owned by the Respondent. It appears that the property was then transferred to Frisco Capital Limited in order to ensure that profits were retained offshore. The Respondent was copied in on the emails relating to this transaction.

125. No particulars were provided by the Respondent in relation to any of the above transactions – and of course these are only the transactions of which HMRC have some evidence. Given that transactions between the Respondent and the Trustee are potentially disclosable in the Respondent's self-assessment returns, it would also be highly surprising if Leigh Carr did not have information in relation to these transactions.

126. We are satisfied on the balance of probabilities that the Respondent has possession, access or de facto control of the information and documents sought by HMRC in the Information Notice, and HMRC have proved that this is the case. The Respondent has not produced any substantive evidence that the documents are not within his de facto possession or control and at best relies upon an inference from his bare assertion.

***Discussion and Decision***

127. It follows from our findings of fact set out above that we must reject Mr Firth's submissions on this issue and the assertions made by the Respondent in paragraphs 7 and 8 of his witness statement, as set out at [97] above.

128. We are satisfied that there is no merit in Mr Firth's argument that HMRC has failed to disclose a large amount of documents that were held by Lawrence Stephens solicitors so cannot prove that the information requested under the Information Notice was not contained within that material and in fact provided to HMRC.

129. First, the obligation was upon the Respondent to provide the information requested under the Information Notice directly himself and he cannot abrogate his responsibility to a third party. Such material, even if provided through his solicitors, would not mean that he had complied with the notice. Second, if such material was held and provided to HMRC by Lawrence Stephens, there should be copies available to the Respondent which he could produce to HMRC and the Tribunal to substantiate the submission that the relevant information was provided through his solicitors. He did not do so. Third, HMRC were not under any obligation to retain and disclose all the material that they inspected or obtained from the solicitors in these proceedings but only to disclose the material they wished to rely upon in support of their application

under Paragraph 50. Fourth, Officer Jackson gave evidence that he identified the documents and material relevant to the investigation as part of his inspection of the Lawrence Stephens material and we are not satisfied that there are important and relevant documents that he did not disclose. There was no evidence in support from the Respondent to establish Mr Firth's submission.

130. It is not an adequate substitute for asking for and then providing the documents himself for the Respondent to allow HMRC to search for such records at his solicitors' office and extract them themselves. Neither did the Respondent act reasonably by directing HMRC to Mr Carter and other professionals without himself asking the persons concerned to provide the information requested.

131. In relation to the Trust documents requested in the first paragraph of the Information Notice, there is no substantive evidence of the Respondent seeking to obtain any of the documents. In particular, the Respondent was asked to obtain a copy of the Trust Deed. Subsequently, HMRC have been able to obtain a copy of that document from Stephen Lawrence Solicitors. There is no suggestion that the Respondent even tried to obtain that document from the Trustees or from any other person. Instead, he simply asked HMRC to contact Mr Carter, who has not responded to HMRC. Our findings demonstrate that the Respondent has the ability to obtain the requested documents from Landmark.

132. In any event, as the beneficiary of the Taj Trust, the Respondent has a right to obtain disclosure of trust documents.

133. As regards the correspondence and details of transactions requested, the Respondent can provide copies of correspondence to which the Respondent was a party or information relating to transactions to which he was a party. Such information is self-evidently within his possession or power. We have given a number of examples of such correspondence and information.

134. In this regard, we are satisfied that there is no reason why the Respondent could not review his own emails and correspondence to comply with the requests for correspondence. The evidence also shows that there was a reasonable amount of contact between Mr Carter and the Respondent who was described by Leigh Carr as the Respondent's mentor who asked him to undertake projects for the companies within the Chartwell Group (of which he is a director).

135. The Respondent did not provide any substantive evidence that he had made any attempts to contact Mr Carter, Landmark, or other professionals. In particular, it would be peculiar if Leigh Carr did not have records of any transactions undertaken by the Respondent given that they prepare and submit his tax returns. The Respondent and his professional advisors should, at the very least, be able to confirm whether or not transactions have occurred.

136. Overall, we were satisfied that the documentation and information requested from the Respondent is (or at least, on the balance of probabilities, is likely to be) in his

possession or power (and no substantive evidence has been provided to show that it is not), and there is no reason why he could not provide the information requested.

137. On this basis, we are satisfied that the Respondent's failure to comply with the Information Notice has continued after the imposition of the Paragraph 39 Penalty, and consequently the condition in paragraph 50(1) (b) is satisfied.

**Third statutory condition for the imposition of a penalty - Paragraph 50 (1)(c) - an officer of Revenue and Customs has reason to believe that, as a result of the failure or obstruction, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been**

***Principles relevant to the application of paragraphs 50(1)(c) and 50(3) of Schedule 36 to the FA 2008***

138. These provisions were considered in the only case on Paragraph 50 which has so far been the subject of a judicial decision. That case, *Tager and another v HMRC* [2019] 1 WLR 720 ("*Tager*"), reached the Court of Appeal, for whom Henderson LJ gave the only reasoned judgment.

139. In relation to the pre-requisite for the imposition of a penalty under Paragraph 50 that an officer of HMRC must have " reason to believe" that "the amount of tax that the person has paid or is likely to pay, is significantly less than it would otherwise have been", and that this state of affairs is "a result of the failure" to comply with the information notice Henderson LJ said this at [8]:

> "In other words, there needs to be a causal link between the taxpayer's failure to comply with the notice and the loss of tax (whether in the past, or prospectively, but it is enough if the officer of HMRC has reason to believe in the existence of such a causal connection."

140. Henderson LJ elaborated on this point at [87] as follows:

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

141. Therefore, there must be a connection between the underpayment of tax (referred to in *Tager* as the "tax at risk") and the information sought by HMRC which the taxpayer has not provided.

142. The requirement is that the HMRC officer must have "reason to believe" that there is a significant amount of tax at risk and that this is connected to the taxpayer's

failure to comply with the information notice. *Tager* makes it clear that this is a subjective test subject only to a basic requirement of rationality.

143. At [89] of Tager, Henderson LJ referred to the requirement of paragraph 50(3) that in deciding the amount of the penalty, the Upper Tribunal must "have regard to the amount of tax which has not been, or is not likely to be, paid by the person. He said:

> "There are some important things to note about this provision. In the first place, although it echoes the language of sub-paragraph (1)(c), it is not qualified by reference to the officer's "reason to believe". On the contrary, the language seems to me to require the Upper Tribunal itself to form a view on the amount of tax unpaid or likely to be unpaid. That view must be formed on the basis of the evidence before the Tribunal, and as a matter of general principle when penalties are in issue, the onus is firmly on HMRC to satisfy the Tribunal of its amount."

144. That does not mean that we should determine the amount of the "tax at risk" conclusively because it might encroach on the role of the FTT who may be called upon to resolve the same issue in the course of appeals against assessments or closure notices. Our decision made in proceedings under paragraph 50 (in particular when applying paragraph 50(3)) should not affect future appeals to the FTT against (e.g.) discovery or protective assessments.

145. Therefore, none of our individual findings as to the precise tax liabilities set out below are made on the balance of probabilities. None of these findings bind any FTT were there to be an appeal against any of the protective assessments issued, to the extent that they address similar or identical alleged tax liabilities of the Respondent, where fuller evidence may be available and differing burdens and standards of proof may apply. The liability is likely to be uncertain not only because it may be prospective, but more importantly because the situation is one by definition in which the taxpayer has failed to comply with a notice requiring the production of information reasonably required for the purpose of checking his tax position.

146. We accept HMRC's argument that the correct approach is for the Tribunal to form a view of the tax at risk based on the evidence before it (the onus being on HMRC to produce such evidence). This is not intended to be a strict application of the evidential burden (i.e. balance of probabilities) but is a question of likelihood and, under this approach, the Tribunal can apply discounts to reflect uncertainties when assessing the quantum of any penalty. On this approach, there would be very little scope for restricting the jurisdiction of the FTT to determine the substantive issues on their full merits as the exercise of the Upper Tribunal would have been different. However, the closer that the Upper Tribunal comes to applying a strict merits jurisdiction when considering paragraph 50(2), the more likely it is that arguments of abuse of process, issue estoppel or *Henderson v Henderson*, might arise on some issues before the FTT. This is a further reason why, in our view, the approach of the Upper Tribunal is not intended to be a strict one in seeking to identify the tax at risk.

147. As submitted by Mr Elliott, the appropriate time at which the officer's belief should be considered is at the time that the application under Paragraph 50 is made, based on the information available to the officer at the time. This is evident from the

order in which the conditions in Paragraph 50(1) are listed, which is intended to be chronological: first the person has become liable to a penalty, then the failure continues, then the HMRC officer forms his reasonable belief, then the application is made, and then the Upper Tribunal considers the matter.

***Issues in dispute in relation to paragraph 50(1)(c) and tax at risk***

148. As appears from his witness statement, Officer Jackson's reasons for believing that there has been an underpayment of tax are based on HMRC's contention that the Respondent: a) is the settlor and sole beneficiary of an offshore trust, the Taj Trust with the consequence that the Respondent is liable to income tax in respect of income that has arisen to various companies owned by the Taj Trust under Chapter 2 of Part 13 of the Income Tax Act 2007 ("the Transfer of Assets abroad legislation"), Chapter 5 Part 5 of the Income Tax (Trading and Other Income) Act 2005 ("the Settlements legislation"); and b) is also liable to capital gains tax in respect of gains that have arisen to any of the non-UK entities owned by the Taj Trust by virtue of the application of sections 13 and 87 of the Taxation Chargeable Gains Act 1992.

149. We set out at [248] to [269] below the relevant statutory provisions referred to at [148] above.

150. The Respondent has raised a number of issues disputing that there was any tax at risk for the purposes of Paragraph 50(1)(c). They require us to answer the following questions:

<u>Income Tax</u>

*Transfer of Assets Abroad legislation*

(1) Was the Respondent a transferor for the purpose of the Transfer of Assets Abroad legislation?

(2) Does the motive defence in sections 736-740 of the Income Tax Act 2007 apply?

(3) Is the Respondent entitled to deductions from his tax liability under the Transfer of Assets Abroad legislation in respect of tax paid by other entities?

*Settlements legislation*

(4) Can the Settlements legislation apply in circumstances such as the present in which income has arisen to companies that are entirely owned directly or indirectly by a trust?

(5) Is there an 'element of bounty' in this case?

*Remittance Basis*

(6) In relation to the remittance basis:

(i) Would it be possible for the Respondent to make claims to be taxed on the remittance basis following assessment?

(ii) Have (or will) remittances occurred of the income arising in 2016-17?

Capital Gains Tax

(7) Is there an 'element of bounty'?

(8) Have there been any distributions form the Trust to which the gains might be matched?

(9) Have any of the distributions been remitted (and is this relevant to the amount of the potential liability)?

*Causal link*

(10) Is there sufficient connection between the failure to comply with the Information Notice and the underpayment of tax?

151. In relation to most of the questions, other than the questions of whether the Respondent was an economic settlor of the Taj Trust and whether he made remittances, the facts are not in dispute. However, the legal consequences of the undisputed facts are in issue.

152. For each of these issues we must decide whether Officer Jackson rationally concluded that as result of the failure to comply with the Information Notice, the amount of tax that the Respondent has paid, or is likely to pay, is significantly less than it would otherwise have been within the meaning of Paragraph 50(1)(c).

153. We will first consider whether Officer Jackson believed there was any tax at risk, and, if so, the amount and whether the belief was reasonable.

154. Then we will consider the Office's belief in causation – whether he reasonably concluded that the tax at risk had arisen as a result of the Respondent's failure to comply with the Information Notice.

155. As we have said, the appropriate time at which the officer's belief should be considered is at the time that the application under Paragraph 50 was made (on 8 October 2020), based on the information available to the officer at the time.

156. Further and in any event, we are satisfied that Mr Jackson's belief remains the same as at the time of the hearing on 28-29 June 2021 and at the time of this decision notwithstanding any additional evidence and arguments raised by the Respondent between the date of the application and the hearing.

157. Finally, we will set out our view of the tax at risk based on the evidence before it, following the approach we have outlined at [144] to [146] above.

***Reasonableness of Officer Jackson's belief as to the tax at risk***

158. In light of the approach above, we are not required to find the following facts on the balance of probabilities but only to find that the Officer had reason to believe that the amount of tax that the Respondent has paid is significantly less than it would have been but for his failure to comply with the Information Notice and to form our view of the same.

*Factual issues in dispute*

159. In relation to the tax at risk, the Respondent does not contest most aspects of the underlying facts presented by HMRC and relied upon by Officer Jackson (but primarily relies on legal challenges). However, Mr Firth did dispute the following:

(1) Whether the Respondent was the economic settlor of the Taj Trust.

(2) Whether remittances may have been made.

*Background*

160. The Respondent was born in the UK and was UK resident for tax purposes in the tax year 2010-11 and in subsequent years (in previous years, the Respondent claimed to be non-resident). In addition, he has claimed (and continues to claim) that he is non-UK domiciled and has made a claim to be taxed on the remittance basis in the year 2016-17 and in subsequent years. However, the Respondent did not claim the remittance basis for the tax years 2013-14, 2014-15 and 2015-16, and is now out of time to make such a claim. For the purpose of the present proceedings, HMRC did not seek to prove that the Respondent was or is in fact UK domiciled.

*The Respondent's tax affairs*

161. The Respondent began filing UK self-assessment tax returns for the tax year 2010-11. It is understood by HMRC that he was previously living in India and/or Monaco. By submitting self-assessment tax returns to HMRC, he has therefore confirmed that he has been UK tax resident since 2010-11.

162. Prior to the 2016-17 self-assessment tax return, the Respondent made no claims for the remittance basis.

163. In his 2016-17 self-assessment return and the subsequent years' returns submitted to HMRC, the Respondent has made claims for the remittance basis. We accept that the Respondent is out of time to make a claim for the remittance basis for 2015-16 and the earlier years (applying the time limit in s 43 of TMA 1970 as amended by Schedule 39 to the Finance Act 2008). Accordingly, for the years 2015-16 and earlier, the Respondent is subject to UK income tax on his worldwide income and subject to UK capital gains tax on his worldwide gains. For the years 2016-17 and subsequent years, he is subject to UK tax on relevant foreign income and foreign chargeable gains to the extent that they are remitted to the UK (as well as on all UK source income and all chargeable gains accruing from the disposal of UK assets).

*HMRC's Investigation*

164. In respect of the self-assessment tax returns submitted to HMRC, up to the tax year 2017-18 the Respondent's primary source of income was said to be through his "self-employment", which arises from his consultancy business. None of the income or capital gains discussed below in relation to the Taj Trust and the offshore structure were disclosed in the Respondent's returns.

165. HMRC wrote to the Respondent on 5 January 2018 to advise that an investigation under Code of Practice 8 had been opened. The letter identifies that HMRC's concerns which prompted the investigation were mainly stemming from the fact that the Respondent was the sole director of a number of UK companies owned by entities resident abroad and HMRC wished to establish his connection to those companies. A number of issues were considered in the course of the investigation but the evidence in this application focussed on matters relating to the offshore structure.

166. On 27 March 2018, a meeting was held between HMRC and the Respondent's representatives, Leigh Carr. At that meeting Leigh Carr informed HMRC that Normandy Group Limited was held by a trust based in Geneva but provided little further information, claiming to be unaware of essential facts such as whether the Respondent was a beneficiary of the Taj Trust.

167. Following the meeting, HMRC wrote to Leigh Carr on 20 April 2018 requesting information and a number of documents to progress the investigation, including the name of the trust and whether or not the Respondent was a beneficiary of that trust.

168. Leigh Carr's letter in reply dated 3 July 2018 stated that:

(1) The trust that owns Normandy Group Limited is the Taj Trust.

(2) Leigh Carr were unable to provide a definitive answer as to whether the Respondent was a beneficiary of the trust and did not wish to speculate, and HMRC should contact Mr Nigel Carter of Landmark in Geneva for any matters relating to the trust.

(3) Frisco Capital Limited had purchased the Waverley Centre on 3 March 2014 for £1,550,000 and, on the same day, sold a substantial part of the property for £1,450,000. In Leigh Carr's opinion the transaction was not subject to capital gains tax.

(4) On 7 May 2014, Frisco Capital Limited had transferred the Resource Centre to Normandy Group Limited as a distribution in specie.

169. On 17 May 2018, HMRC commenced an investigation into the tax affairs of Frisco Capital Limited. On 31 July 2018, Leigh Carr provided certain information, including that Frisco Capital Limited had received rent of £198,636 from Chartwell Care Services Ltd in 2016-17.

170. HMRC sought further information from Leigh Carr on 31 August 2018, including as to whether the Respondent had received any distributions from the Taj Trust since 2010. Leigh Carr responded stating that no such distributions had been received.

171. In a letter dated 30 January 2019 (but sent on 31 January) Officer Jackson sought further information and sought consent from the Respondent to issue a third-party information notice to the UK officer of Landmark, being the Morgan Trust Company Limited. The Morgan Trust Company Limited responded on 11 March 2019 stating that it did not possess any documentation in relation to the Respondent or any of the entities mentioned in HMRC's request.

172. On 1 February 2019, Officer Jackson also wrote directly to Mr Carter seeking information regarding the Taj Trust and the companies that it owned. On 6 March 2019, Mr Carter responded stating that information was being collated, but no substantive response was ever received from Mr Carter or Landmark.

173. Following the failure to obtain further information, HMRC sought the approval of the FTT for the issue of the Information Notice to the Respondent (as is set out above). In addition, HMRC issued a third-party notice to Lawrence Stephens Solicitors, which had been agreed by the Respondent and which was complied with by Lawrence Stephens Solicitors.

*The Taj Trust and the Offshore Structure*

174. The facts set out in this section relating to the Taj Trust and the companies that are held by the Trust are based on the information held by HMRC. This information has largely been obtained (after the issue of the Information Notice) from third parties, including Lawrence Stephens Solicitors, the Land Registry, and the tax authorities in Switzerland, Panama, British Virgin Islands and St Kitts and Nevis. However, this information is necessarily incomplete given the absence of compliance with the Information Notice.

175. The Taj Trust is a discretionary trust that was constituted by a deed dated 1 November 2001. The deed does not specify the settlor of the Trust. The initial beneficiaries of the Trust were the Respondent, the International Red Cross and Mr Kulvir Singh Sunda. The documentation obtained by HMRC and considered by Officer Jackson shows that the beneficiaries have been altered as follows:

(1) Mr Sunda was excluded from being a beneficiary on 1 December 2001 (i.e. one month after the Trust was established).

(2) Five other beneficiaries were added on 15 December 2001 but then excluded on 23 April 2014.

(3) Accordingly, since 23 April 2014, the Respondent has been the sole individual beneficiary of the Trust. This is also confirmed by documents obtained from third parties which were in evidence before us stating that the Respondent is the sole beneficiary of the Trust. As is clear from his witness statement, the Respondent does not now seek to deny that he is the sole beneficiary of the Taj Trust.

*Economic Settlor*

176. The Respondent gave the following evidence in his witness statement denying he was the economic settlor of the Taj Trust.

> "9. From my understanding the circumstances of the setting up of the Taj Trust were that it was settled by a Mr Sukhdev Singh Bassi, who is a distant relative of mine.
>
> 10. While I have lent the Taj Trust money at market rates, for the avoidance of doubt. I am not nor have ever been a settlor or economic settlor of the Taj Trust. My understanding is that Mr Bassi is the only and original settlor of the trust.
>
> 11. At the time of the establishment of the trust on 1 November 2001 I was visiting India. I had just experienced a difficult period in my life- I had been the victim of fraud which forced me to enter an individual voluntary arrangement in or around 1996 or 1997. I was also experiencing difficulties in my person life. By December 1997 my wife had left the UK for India. I decided to join her in India to attempt to reconcile with her and rebuild my career after my individual voluntary arrangement.
>
> 12. While in India I re-established relationships with some of my extended family. Including Mr Bassi, I understand it was out of sympathy for my situation that Mr Bassi established the Taj Trust for my benefit.
>
> 13.Plainly, as I was in an individual voluntary arrangement I did not myself have the funds required to settle the trust at that time."

177. The Respondent therefore denies being the economic settlor of the Taj Trust.

178. Nonetheless, we are satisfied that it was reasonable for Officer Jackson to believe that the Respondent was the economic settlor. We reject the evidence of the Respondent in this regard for the following reasons.

179. The Respondent did not give oral evidence on oath or affirmation and was not available for cross examination and therefore less weight can be given to his witness statement. In any event, his evidence is contradicted by the documentary evidence that was before us, as detailed below.

180. According to the trial balances provided of the Taj Trust, the Trust was initially settled with a sum of $4,000 (USD). While there is evidence that another individual made the initial contribution of $4,000 (albeit there is no evidence of the source of these funds), this was only settled to "cover the formation costs of the trust".

181. Following that initial settlement, the Respondent made significant contributions to the Trust of approximately $1.3m (USD). In the nominal ledger report for the Taj Trust for the period from the establishment of the trust to 31 December 2017 obtained by HMRC, under the heading "Capital Additional Funds" a number of sums are shown: some are stated to be from the Respondent, including from his personal HSBC account. Other sums are stated to be from the HSBC account of the "client" who is evidently the Respondent**.**

182. The evidence demonstrates that the Respondent then made significant contributions to the Taj Trust. In particular, the Panamanian tax authorities provided to HMRC ledgers showing transactions between 2001 and 2009, Capital Additional Funds of $1,390,810.33 were added. The entries in state that the funds come from the Respondent/the "client" from December 2004.

183. In addition, the Respondent made a number of significant loans to the Trust, including £1,195,481.74 by the end of 2006. Interest paid to the Respondent on loans can also be seen in the ledgers provided by the St Kitts and Nevis tax authority.

184. Accordingly, whilst it was unclear whether or not the Respondent was the formal settlor of the Taj Trust, it is was rational for Officer Jackson to conclude, and we were satisfied on the balance of probabilities, that the Respondent was, the economic settlor of the Trust. This is confirmed in correspondence obtained from third parties which Officer Jackson relied upon. For example:

(1) An email from Steve Woolridge on behalf of the Chartwell Group of Companies on 15 April 2014 to Alternative Bridging Corporation Limited (the Respondent and Mr Carter were recipients of the email) which stated:

"The original settlor for [the Taj Trust] was a gentleman called Sukhdev Singh who I understand paid in $6000 [Note: probably $4,000] just to cover the formation costs of the trust. We are not in touch with him now and I understand he retired to Canad[a] many years ago. The economic settlor and beneficiary of the [Taj Trust] was Sukhdev Ajit Inder Mattu. He is, therefore, the beneficial owner of the group."

(2) An email from Steve Woolridge to Paresh Market Financial Solutions dated 21 February 2014 which states "Taj Trust – this is a discretionary family trust set up by Mr Mattu".

(3) Email correspondence between Stephen Messias of Lawrence Stephen Solicitors and Sarah Hollis of Barclays on 6-7 June 2017 (the Respondent was a recipient of the email) in which Mr Messias has responded to information sought by Barclays as follows:

"Trustees – THE GENERAL TRUST COMPANY S.A.
Settlor – MR SUKHDEV MATTU
Protector – THERE IS NO PROTECTOR
Beneficiaries – THE PRIMARY BENEFICIARY IS MR SUKHDEV MATTU".

185. In respect of (3), it is highly unlikely that a solicitor would make such statements to a bank when seeking financing unless they had a reasonable degree of certainty that the information that was being sought was accurate.

186. For completeness, the account advanced by the Respondent in his skeleton argument suggested that the funds which constituted the contributions of funds to the Taj Trust were in fact transfers of "the trust's own money" which had arisen from a

transaction undertaken by a company owned by the Trust. The Respondent makes no reference to this in his witness statement.

187. We accept HMRC's submission that this account is unevidenced and illogical. A trust cannot fund itself and, even if this account were accurate, there must have been funds contributed to the Taj Trust in order for it to establish/acquire the company/assets to sell – evidently there must have been funds contributed by someone at some stage, and the only person who could have done so is the Respondent.

188. Overall, aside from the initial $4,000 (which was for expenses), there is no evidence or suggestion that anyone else has contributed funds to the Taj Trust.

189. Given the evidence available to Officer Jackson at the time of the application (and still available), which strongly indicates that the Respondent contributed significant funds to the Trust, he certainly had reason to believe that the Respondent was the economic settlor of the Trust. We are therefore satisfied it was reasonable for Officer Jackson to believe and that there is compelling evidence that the Respondent was the economic settlor of the Taj Trust.

*Companies associated with the Taj Trust*

190. The Taj Trust acquired (or formed) a number of non-UK companies. Given that there does not appear to be any other source of significant funds, it was reasonable for Officer Jackson to infer that these companies must have been formed or acquired and funded using the funds contributed or loaned by the Respondent (or funds derived from those funds). The relevant companies are:

> (1) Holdenby Properties Limited ("Holdenby") and Berkeley Estates Properties Limited ("Berkeley"), formerly Mardale Properties Limited, both of which were incorporated in the British Virgin Islands. Between 2004 and 2008, these companies purchased seven UK properties. It is inferred that the properties were purchased using the funds contributed or loaned to the Taj Trust. In one case this is confirmed as the evidence before us from the ledgers referred to at [181] above shows that 244 Milligan Road was purchased using a loan from the Respondent.
>
> (2) Autumn Breeze Investments Limited, a company incorporated in Monaco which purchased a UK property in 2006.
>
> (3) Normandy Group Limited, a company incorporated on 5 March 2014 in the Seychelles and owned directly by the trustees of the Taj Trust. The director of Normandy Group Limited is Mr Nigel Carter**.**
>
> (4) Frisco Capital Limited, a company incorporated in 2014 in the Seychelles. This company is not to be confused with Frisco Limited, a UK company beneficially owned by the Respondent that was incorporated on 19 September 2012.

Normandy Group Limited and Frisco Capital Limited were established as part of a restructuring in early 2014 under which Normandy Group Limited became (in effect) the holding company for the Taj Trust.

*The Chartwell Group*

191. In addition, since 2014 Normandy Group Limited has been the owner of a group of UK companies ("the Chartwell Group") operating in the health and social care sector. The Respondent is a director of each of the companies in the Chartwell Group.

192. The Chartwell Group (specifically Chartwell Care Services Ltd) rented the UK properties owned by Berkeley and Holdenby until May 2016 when the properties were transferred to Frisco Capital Limited. Since the UK properties were rented by the Chartwell Group from Holdenby and Berkeley, each of those offshore companies received rental income from Chartwell Care Services Ltd (which was not declared to HMRC).

*Transactions giving rise to the alleged tax at risk*

193. Officer Jackson estimated that the rental income would have been approximately £198,636, being the same amount of rent as was received by Frisco Capital Limited in 2016-17 in relation to the same properties. Frisco Capital Limited's non-resident landlord returns for the tax years 2016-17 and 2017-18 declared rental income of £198,636 and £305,314 respectively. Leigh Carr confirmed in a letter to Officer Jackson dated 31 July 2018 that the income received by Frisco Capital Limited related to the same properties Holdenby and Berkeley previously owned. The rents and rates declared by Chartwell Care Services Limited in its own returns between 2014 and 2017 were approximately £260,000-£275,000.

194. On 4 March 2014, Frisco Capital Limited purchased a UK property (referred to as the Wakeley Centre) for £1,550,000. On the same day, Frisco Capital Limited sold a substantial part of the property for £1,450,000. It retained part of the property, known as the Resource Centre. On 7 May 2014, the Resource Centre was then transferred to Normandy Group Limited from Frisco Capital Limited, in the form of a dividend in specie. Mr Woolridge (a consultant acting on behalf of the Chartwell Group) had the Resource Centre valued at £800,000[1] at the time.

195. Accordingly, Officer Jackson reasonably believed a dividend in specie with the value of £800,000 was paid by Frisco Capital Limited to Normandy Group Limited on 7 May 2014.

[1] Computing this value [B], and the value of £1,450,000 [A] into the formula in paragraph 138(3)(d) TCGA 92 allows the chargeable gain to be calculated at a value of £451,111.
Consideration proceeds: £1,450,000
Apportioned costs: £1,550,000 x £1,450,000 / (£1,450,000+ £800,000) = £998,889
Chargeable gain: £1,450,000 - £998,889 = £451,111

196. In 2015 and 2016, all of the properties owned by Holdenby and Berkeley were sold to Frisco Capital Limited as part of (what is understood to have been) a restructuring.

197. In (or shortly after) April 2015, following the sale of a property for £450,000, Autumn Breeze Investments Limited paid a dividend of £327,069 to Normandy Group Limited. The existence of this transaction is also confirmed by the fact that Autumn Breeze Investments Limited no longer exists and therefore the proceeds of the sale (£450,000) would ordinarily have been transferred to its shareholder, Normandy Group Limited.

198. Following the sale of properties to Frisco Capital Limited in May 2016 for over £3.7 million, Holdenby and Berkeley declared a dividend of approximately £2.44 million to Normandy Group Limited. This is also confirmed by the fact that neither company now exists, and ordinarily this would entail the sale proceeds being distributed to the companies' shareholder, Normandy Group Limited.

199. Frisco Capital Limited lent funds to Chartwell Asset Management Limited, the sum due was £794,640 by July 2017, based on an analysis provided by Leigh Carr to HMRC.

200. The funds lent to Chartwell Asset Management Limited appear to include a £327,059 loan, which appears to have preceded a £327,059 loan from Normandy Group Ltd to Frisco Capital Limited. On this basis, Officer Jackson reasonably assumed that the rate of interest paid by Chartwell Asset Management Limited must have been at least 5% on that proportion of the funds, so that Frisco Capital Limited could meet the interest owed to Normandy Group Limited on the same sum according to the loan terms for funds being advanced by Normandy Group Limited to Frisco Capital Limited.

201. On this basis:

(1) Interest at 5% on £327,059 means that Frisco Capital Limited would have received £16,352 per annum;

(2) If it were assumed that the entire loan by Frisco Capital Limited was subject to interest at 5% then, on £794,640, the interest would have been £39,732 per annum.

*Whether Remittances were made*

202. In the year 2016-17, Officer Jackson considered that the Respondent was chargeable to income tax to the extent that the income concerned has been remitted to the UK. Since the Respondent had not provided the information requested in the Information Notice (in particular the trust accounts) it was not presently known to what extent funds have been remitted. However, the Officer reasonably believed there is evidently a strong possibility that the funds have been remitted: for example, the funds might have been used to purchase UK property or might have been loaned to a UK resident company (as appears to occur frequently within the offshore structure).

203. Officer Jackson referred to evidence that £900,000 of the sums paid to Normandy Group Limited were lent to Chartwell Care Holdings Limited and Frisco Capital Limited did purchase UK properties in May 2016, 2017 and 2020. In addition, it understood that Normandy Group Limited did not have its own bank account and therefore any funds would have been paid to the Respondent acting as nominee for Normandy Group Limited. See, for example, the letter from Leigh Carr to HMRC dated 2 September 2019:

> "However, there was no Group bank account so the Respondent acted as their Nominee to accept any funds should the Administrators distribute. Accordingly, the monies received do not belong to The Respondent but to the Group – Normandy Limited. Please refer to out letter of 8 November 2018 point 10xi where we state that Mr Mattu is not the beneficial owner of the money received from Thornton Rones."

204. Accordingly, Officer Jackson reasonably believed that whilst the Respondent's failure to comply with the Information Notice prevented HMRC from being certain, there is evidence that part of the income arising in 2016-17 has been remitted to the UK, and a strong possibility that further income has been remitted (or will be).

*Officer Jackson's belief as to the Tax at Risk*

205. In light of the above, Officer Jackson believed that if the Respondent were to be subject to Income Tax and Capital Gains Tax in respect of the all the above transactions then the additional tax due for the tax years 2013-14 to 2016-17 amounts to £1,916,315.

206. For completeness, this was broken down as:

(1) £198,636 of rental income received by Berkeley and Holdenby in tax years 2014-15 and 2015-16 (see [193] above);

(2) £16,352 of loan interest income received by Frisco Capital Limited in tax year 2015-16 and 2016-17 (see [201] above);

(3) £800,000 of dividend income received by Normandy Group Limited in tax year 2013-14 (see [195] above);

(4) £327,069 of dividend income received by Normandy Group Limited in tax year 2015-16 (see paragraph [197] above);

(5) £2,440,000 of dividend income received by Normandy Group Limited in 2016-17 (see [198] above); and

(6) £451,111 chargeable gain accrued to Frisco Capital Limited in 2013-14 (see [194] above).

207. It was broken down by tax year as follows:

- 2013-14 – £135,955.39
- 2014-15 – £471,125.44

- 2015-16 – £244,192
- 2016-17 – £1,100,688

208. In his witness statement, Officer Jackson stated he believed that the tax at risk was £1,916,315. However, in preparing for the hearing it was noticed that the distribution in specie which occurred in May 2014 (see [195] above) has been calculated as taxable in the 2013-14 year, whereas in fact it was taxable in the 2014-15 year. Revised calculations were submitted to the Tribunal which show that the tax due in 2013-14 was therefore said to be £135,955.39 and the tax due in 2014-15 to be £471,125.44. This led to a recalculation of the total tax at risk figure to be £1,917,578.

209. Officer Jackson's views on the tax at risk required him to apply the law as he interpreted it to the evidence he considered. At this stage we have only considered whether Officer Jackson's beliefs based on his interpretation of the law and the factual conclusions he drew from the evidence he considered were reasonable.

210. The Respondent challenges Officer Jackson's view of the application of the law in respect of several issues which we discuss below. We address the law separately below and consider, but reject, the Respondent's legal submissions that Officer Jackson erred in law in holding his belief as to the tax at risk.

211. We are satisfied that Officer Jackson's belief that the total tax at risk was reasonable and totalled in relation to the above transactions £1,917,578 (plus interest) in the years 2013-14 – 2016-17.

212. Further, we accept that Mr Jackson's belief which he had at the time of making the application on 8 October 2020 remains rational as at the time of our decision notwithstanding the additional evidence and arguments raised by the Respondent in the present hearing.

213. We are satisfied that there was tax at risk and we form the same view as the Officer that his figure represents the tax at risk. Nonetheless, we repeat that we have not sought to resolve the issue conclusively as a matter of fact because it might encroach on the role of the FTT which might in the future be called upon to resolve the same issue in the course of appeals against assessments or closure notices that HMRC have issued as addressed below.

*Protective Discovery Assessments*

214. Correspondence has continued between the parties, with Leigh Carr providing responses to HMRC's queries (but the Respondent not complying with the Information Notice relating to the offshore structure).

215. In addition, in order to protect tax that may be owed, HMRC protectively issued discovery assessments for the years 2012-13 – 2015-16 to best judgement on 22 March 2019 and 13 March 2020. They were in the sums as follows:

• 2012-13 – £110,732. This was composed of tax on £250,000 of additional foreign income.

• 2013-14 – £233,907. This was composed of tax on £250,000 of additional foreign income and £449,010 of capital gain (being the part disposal of the property in March 2014).

• 2014-15 - £224,285. This was composed of on (i) £250,000 of additional foreign income (ii) £77,160 of employment income (HMRC considered that the Respondent was employed by the Chartwell Group, as opposed to being a self-employed consultant) (iii) £51,784 of employment benefits (based on the Respondent residing free of charge in a property owned by Chartwell Asset Management Limited), and (iv) £300,000 of capital gains.

• 2015-16 – £281,161. This was composed of tax on (i) £552,833 of foreign income, (ii) £86,309 of employment income (based on the Respondent being employed as opposed to self-employed), (iii) £24,052 of employment benefits, and (iv) a capital gain of £75,000.

216. On 3 March 2021 (after the Paragraph 50 Application had been made), HMRC also issued an assessment in relation to the year 2016-17 in the sum of £1,129,010.68.

*Causal link*

217. We accept that it was reasonable for Officer Jackson to believe that the tax at risk is causally linked to the Respondent's failure to provide the information and documentation sought by HMRC under the Information Notice with which the Respondent has failed to comply. We come to that conclusion for the following reasons.

218. Under the Information Notice, in particular, HMRC have requested copies of the documentation relating to the Taj Trust, correspondence between the Respondent and the Trustee and details of the transactions between the Respondent and the Trustee in order to:

(1) Verify all of the above transactions (so as to be able to quantify the tax liabilities accurately);

(2) Confirm whether remittances have been made to the UK in 2016-17;

(3) Confirm what distributions have been made to the Respondent (either directly or indirectly, for example through favourable transactions with him);

(4) Check whether there are other similar transactions on which tax ought to be charged.

219. At the time of making the Paragraph 50 Application Officer Jackson compared:

(1) the amount of tax that the Respondent has self-assessed for the relevant years (in that regard HMRC have received no correspondence that suggests the

Respondent has agreed to pay any additional tax and therefore it is not likely at this stage that he shall pay any further tax); and

(2) the amount of additional tax that can be estimated based on the information currently available to HMRC.

220. The tax the Respondent had paid via the Self-Assessment returns submitted to HMRC, was £60,923.83, which is made up of:

- 2013/14 – £12,696.31
- 2014/15 – £21,686.29
- 2015/16 – £21,311.25
- 2016/17 – £ 5,229.98

221. The amount of additional tax that can be estimated is based on the information available to HMRC. On calculating this amount of tax, this can be calculated on the five transactions (relating to income) and the one transaction (relating to a chargeable gain) that have been explained above.

222. Consequently, if the Respondent were to be subject to Income Tax and Capital Gains Tax in respect of the all the above transactions, then the additional tax due for the tax years 2013-14 to 2016-17 amounts to £1,917,578 - the "tax at risk".

223. Although HMRC can estimate that more tax is due because the information and documents requested from the Respondent have not been provided, HMRC cannot determine conclusively whether the additional charges arise.

224. Further if HMRC were to issue assessments (which they subsequently did after making the Paragraph 50 Application), Officer Jackson believed HMRC might be prejudiced in Tribunal proceedings if the Respondent were to appeal against any assessments due to the gaps in the information held. Officer Jackson was mindful that a taxpayer's general disclosure obligations before the Tribunal would not necessarily enable HMRC to obtain the information and documentation that they have sought under the Information Notice.

225. For example, HMRC have limited evidence regarding what capital payments have been made to the Respondent by the Taj Trust and (for certain years) whether sums have been remitted. At present Officer Jackson believed that HMRC may have insufficient information on which it might base an assessment in relation to the capital gain of £451,111 (or with which it might resist an appeal in relation to the relevant capital gains tax liability).

226. In addition, HMRC are unable to calculate accurately the amount of income that has arisen to the Taj Trust and various companies or whether such income would (in principle) be chargeable under the Transfer of Assets Abroad Legislation or the Settlements Legislation. Without further information, Officer Jackson considered HMRC may struggle to defend an appeal against an assessment and would risk underassessing the Respondent.

227. We are satisfied that it was reasonable for Officer Jackson to hold each of these beliefs.

228. Officer Jackson also highlighted that there may be further tax due that HMRC cannot yet quantify. The calculations above are based on specific transactions in respect of which HMRC have managed to obtain (some) evidence. Based on the facts as understood, and what appears to be a lack of compliance by the Respondent and various entities owned by the Taj Trust, he believed that there is a strong possibility that further income has arisen within the structure which would be subject to tax and that any assessment based on the known transactions would constitute an under-estimate of the Respondent's liability.

229. For example:

> (1) Normandy Group Limited or Frisco Capital Limited may be in receipt of further loan interest. Frisco Capital Limited is owed £794,640 from Chartwell Asset Management Limited (see [199] above) but the above calculation is only based on a loan value of £327,069. If the entire sum loaned were subject to interest at 5% then the interest received would be £39,732 per annum (rather than £16,353 calculated only by reference to the £327,069).
>
> (2) Frisco Capital Limited is in receipt of over £300,000 rental income. Although this is subject to UK tax via the non-resident landlord returns, Frisco Capital Limited may have made further investments and earned additional interest or income on these sums, which income may be subject to tax under the Transfer of Assets Abroad legislation or Settlements legislation. If Holdenby and Berkeley were receiving income from the properties since at least 2010, over the last 10 years this income may be substantial.
>
> (3) Frisco Capital Limited is continuing to purchase new UK properties. As recently as September 2020 it purchased a new property for £792,774. This would demonstrate significant funds are available and investments are being made by the structure. However, at present, HMRC have only considered and calculated the tax at risk up to 2016-17.

230. It was not in dispute that the tax the Respondent has paid to date, being £60,923.83 (for the relevant period), is significantly less than it would otherwise have been if the Respondent had complied with the Information Notice. Officer Jackson reasonably estimated that £1,917,578 of additional tax is due but could not be certain as to the exact amount because the information and documents requested have not been provided to allow HMRC to accurately quantify the amounts of additional tax due.

231. We are satisfied that Officer Jackson evidently had a rational belief that there was a connection between the information that he sought and the tax at risk (as a result of the Transfer of Assets Abroad legislation and/or the Settlements Legislation) and capital gains tax at risk.

232. In cross-examination, Officer Jackson confirmed that he had considered the difference between these figures (which he described as X and Y) to be the tax at risk. He also considered the tax that he could not quantify (Z), to potentially be tax at risk – which is considered below.

233. In cross-examination, Officer Jackson was challenged on whether or not he believed that his confidence in certain tax assessable undermined his reasonable belief that the failure to comply with the Information Notice caused the underpayment of tax: he gave the honest response that in certain respects he had confidence, on the balance of probabilities (as, in relation to certain issues, in particular that the Respondent was the economic settlor of the Taj Trust and that certain dividends had been paid).

234. However, he consistently acknowledged that on an appeal against an assessment, the FTT might not necessarily agree with all of the inferences that he had drawn because of the lack of supporting evidence or the gaps in the evidence. He also acknowledged that the legislation in issue (the Transfer of Assets Abroad Legislation and the Settlements Legislation) is highly fact sensitive.

235. We accept Officer Jackson's evidence as being honest and reasonable.

236. In his statement Officer Jackson gave examples of information that HMRC sought in the Information Notice that is relevant to the tax at risk:

> (1) He sought evidence of capital payments/distributions made by the Taj Trust – formal distributions should be visible from the Trust accounts. However, distributions can be made in a number of ways, for example a payment made from one of the companies held by the Trust or in the course of a beneficial transaction between the Respondent and a company owned by the Trust: in this regard it is notable that previous payments from a company owned by the Trust (TJ Holdings Inc) had been treated as a distribution by the Trustee.
>
> (2) He also refers to information required in relation to remittances, which could be made in a number of forms.
>
> (3) He requires further information of the income arising that would taxable under the Transfer of Assets Abroad Legislation or the Settlements legislation.

237. In cross-examination, Officer Jackson noted that the trust accounts would assist in establishing exactly what income arose within the offshore structure and at what level (i.e. to which entity). This would be highly relevant to the application of the Settlements Legislation. In this regard it is noted that for some of the income, Officer Jackson has had to estimate the income or rely on indirect evidence. For example:

> (1) Email evidence of the amount of a dividend that was to be paid (and it has been assumed that it was).
>
> (2) The amount of rental income that arose to Holdenby and Berkeley, which Officer Jackson has estimated by reference to the rental income received by a different entity, which he understands acquired the same properties.

(3) The interest rates that applied to certain loans, which Officer Jackson estimated based on the rate of interest charged to the lender. He is aware that other sums were lent but is unable to estimate the interest rate on those loans.

238. In cross-examination, Officer Jackson also explained that he required particulars of all transactions between the Respondent and the Trustee to see any distributions made to the Respondent (either in the UK or abroad) and thus establish if any remittances occurred (in the year in which the remittance basis is relevant). In this regard it is noted that the Respondent now seeks to rely on the remittance basis in relation to all years. Remittances can take many forms and do not necessarily need to be made through the Respondent's own bank accounts (in particular, since payment to or on behalf of the Respondent sometimes appear to be made through his solicitors).

239. Officer Jackson also stated that he required all the correspondence between the Respondent and Mr Nigel Carter during the relevant period because Mr Carter was said to be a mentor to the Respondent and therefore he expected them to be in contact and discuss the financial transactions undertaken by the Respondent. He pointed to an email in the bundle which suggested that such correspondence between the Respondent and Mr Carter did indeed exist (which would have preceded this email). In re-examination he also confirmed this belief.

240. In addition, since Officer Jackson's witness statement, the Respondent has raised the motive defence (which we address below). If this point is pursued then the motives relating to all relevant transactions (i.e. the transfer of assets and all associated operations) will be relevant, and a source of such motivations will be the correspondence between the Trustee and the Respondent, and the details of the property transactions.

241. In cross-examination, Officer Jackson rejected the suggestion that he had all of the information that he required in order to determine the Respondent's tax liability and to defend any appeal against the assessments (including rejecting the suggestion that in fact he might have obtained all necessary information from Lawrence Stephens).

242. In addition, the above examples are connections between specific tax liabilities that have been identified by HMRC based on the available evidence. However, the tax at risk comprises tax liabilities arising for the relevant years (and potentially in other years) in relation to income that has arisen within the offshore structure and chargeable gains that have accrued.

243. We accept HMRC's submission that the fact that there may be further tax outstanding in respect of transactions of which HMRC are unaware is indeed relevant to the condition in Paragraph 50(1)(c) (even if such sums might be discounted significantly for the purposes of Paragraph 50(3)).

244. We are satisfied that belief was reasonable that there was a causal link between the tax at risk and the Respondent's failure to comply with the Information Notice.

*Conclusion as to the Officer's belief based on the facts*

245. We are satisfied that it was reasonable for Officer Jackson to believe that the Respondent's failure to comply with the Information Notice resulted in the amount of tax that the person has paid, or is likely to pay, being significantly less than it would otherwise have been, that sum being £1,917,578. We have formed the same view of the facts ourselves.

246. These conclusions on the facts are subject to considering the Respondent's legal challenges to Officer' Jackson's beliefs that Income Tax and CGT were payable which we now address.

247. This requires consideration of the Respondent's submissions on the substantive law. That requires consideration of the Transfer of Assets Abroad Legislation, the Settlement Legislation, the remittance basis for taxation of foreign income, and the taxation of chargeable gains.

***The Law***

*Transfer of Assets Abroad Legislation*

248. Chapter 2 of Part 13 Income Tax Act 2007 ("ITA 2007") imposes a charge to income tax in circumstances in which income arises to a person abroad as a result of a transfer of assets in circumstances in which a person who is UK resident has power to enjoy the income of the person abroad.

249. Section 720 ITA 2007 charges tax on income treated as arising under section 721 as follows:

> "**Section 720 – Charge to tax on income treated as arising under section 721**
>
> (1) The charge under this section applies for the purpose of preventing the avoiding of liability to income tax by individuals who are UK resident by means of relevant transfers.
>
> (2) Income tax is charged on income treated as arising to such an individual under section 721 (individuals with power to enjoy income as a result of relevant transactions).
>
> (3) Tax is charged under this section on the amount of income treated as arising in the tax year.
>
> (4) But see section 724 (special rules where benefit provided out of income of person abroad) and section 726 (non-UK domiciled individuals to whom remittance basis applies).
>
> (5) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.
>
> (6) For rules about the reduction in the amount charged in some circumstances and the availability of deductions and reliefs, see–

section 725 (reduction in amount charged where controlled foreign company involved), and section 746 (deductions and reliefs where individual charged under this section or section 727).

(7) For exemptions from the charge under this section, see sections 736 to 742A (exemptions where no tax avoidance purpose or genuine commercial transaction, etc)."

250. Section 721 treats income as arising to a UK-resident individual in circumstances in which the individual has power to enjoy the income of a person abroad as a result of a relevant transfer and/or one or more associated operations and the income would be chargeable to income tax if it were the individual's income and received by the individual in the UK as follows:

"**Section 721 – Individuals with power to enjoy income as a result of relevant transactions**
(1) Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A to C are met.
(2) Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of–
(a) a relevant transfer,
(b) one or more associated operations, or
(c) a relevant transfer and one or more associated operations.
(3) Condition B is that the income of the person abroad would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom.
(3A) Condition C is that the individual is UK resident for the tax year.
(3B) The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to sections 724 and 725).
(3C) Subsection (1) does not apply if—
(a) the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and
(b) all that income tax has been paid.
(4) For the purposes of subsection (2), it does not matter whether the income of the person abroad may be enjoyed immediately or only later.
(5) It does not matter for the purposes of this section–
(b) whether the individual is UK resident for the tax year in which the relevant transfer is made (if different from the tax year mentioned in subsection (1)), or
(c) whether the avoiding of liability to income tax is a purpose for which the transfer is effected.
(6) For the circumstances in which an individual is treated as having the power to enjoy income for the purposes of this section, see section 722."

251. A relevant transfer is defined in s 716 as a transfer of assets whereby income becomes payable to a person abroad either as a result of the transfer or as a result of one or more associated operations or a combination of the transfer and one or more associated operations as follows:

"**Section 716 – Meaning of "relevant transfer" and "transfer"**
(1) A transfer is a relevant transfer for the purposes of this Chapter if-
(a) it is a transfer of assets, and
(b) as a result of-
(i) the transfer,
(ii) one or more associated operations, or
(iii) the transfer and one or more associated operations, income becomes payable to a person abroad.
(2) In this Chapter "transfer", in relation to rights, includes the creation of the rights.
(3) For the meaning of "assets", see section 717."

252. For this purpose, "assets" includes property or rights of any kind (s 717). An "associated operation" is defined in s 719 as meaning an operation of any kind effected by any person in relation to the assets transferred (or any assets representing those assets) or any income arising from those assets (or representing accumulations of income) as follows:

"**Section 719 – Meaning of "associated operation"**
(1) In this Chapter "associated operation", in relation to a transfer of assets, means an operation of any kind effected by any person in relation to—
(a) any of the assets transferred,
(b) any assets directly or indirectly representing any of the assets transferred,
(c) the income arising from any assets within paragraph (a) or (b), or
(d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).
(2) It does not matter whether the operation is effected before, after or at the same time as the transfer."

253. Section 718 defines "person abroad", which includes a non-resident person (for example, non-resident trustees or a non-resident company) as follows:

"**Section 718 – Meaning of "person abroad" etc**
(1) In this Chapter "person abroad" means—
(a) a person who is resident outside the United Kingdom, or
(b) an individual who is domiciled outside the United Kingdom.
(2) For the purposes of this Chapter, the following persons are treated as resident outside the United Kingdom—
…
(b) the person treated as non-UK resident under section 475(3) (trustees of settlements), and
(c) persons treated as non-UK resident under section 834(4) (personal representatives)."

254. Sections 722 and 723 define (in broad terms) the circumstances in which an individual is treated as having "power to enjoy income" for the purposes of s721 as follows:

"**Section 722 – When an individual has power to enjoy income of person abroad**

(1) For the purposes of section 721, an individual is treated as having power to enjoy income of a person abroad if any of the enjoyment conditions are met.
(2) In subsection (1) "the enjoyment conditions" means conditions A to E as specified in section 723.
(3) In determining whether an individual has power to enjoy income for the purposes of section 721, regard must be had to the substantial result and effect of all the relevant transactions.
(4) In making that determination all benefits which may at any time accrue to the individual as a result of the transfer and any associated operations must be taken into account, irrespective of–
(a) the nature or form of the benefits, or
(b) whether the individual has legal or equitable rights in respect of the benefits.

**Section 723 – The enjoyment conditions**
(1) Condition A is that the income is in fact so dealt with by any person as to be calculated at some time to enure for the benefit of the individual, whether in the form of income or not.
(2) Condition B is that the receipt or accrual of the income operates to increase the value to the individual–
(a) of any assets the individual holds, or
(b) of any assets held for the individual's benefit. 24 OFFICIAL (3) Condition C is that the individual receives or is entitled to receive at any time any benefit provided or to be provided out of the income or related money.
(4) In subsection (3) "related money" means money which is or will be available for the purpose of providing the benefit as a result of the effect or successive effects–
(a) on the income, and
(b) on any assets which directly or indirectly represent the income,
of the associated operations referred to in section 721(2).
(5) Condition D is that the individual may become entitled to the beneficial enjoyment of the income if one or more powers are exercised or successively exercised.
(6) For the purposes of subsection (5) it does not matter–
(a) who may exercise the powers, or
(b) whether they are exercisable with or without the consent of another person.
(7) Condition E is that the individual is able in any manner to control directly or indirectly the application of the income."

255. Where an individual is non-domiciled and chargeable on the remittance basis, section 726 provides that the deemed income is treated as "foreign" income if it would be relevant foreign income if it were the individual's and as "relevant foreign income" if it would be if it were the individual's as follows:

"**Section 726 – Non-UK domiciled individuals to whom remittance basis applies**
(1) This section applies in relation to income treated under section 721 as arising to an individual in a tax year ("the deemed income") if section 809B, 809D or 809E (remittance basis) applies to the individual for that year.

(2) For the purposes of this section the deemed income is "foreign" if (and to the corresponding extent that) the income mentioned in section 721(2) would be relevant foreign income if it were the individual's.
(3) Treat the foreign deemed income as relevant foreign income of the individual.
(4) For the purposes of Chapter A1 of Part 14 (remittance basis) treat so much of the income within section 721(2) as would be relevant foreign income if it were the individual's as deriving from the foreign deemed income.
(5) In the application of section 832 of ITTOIA 2005 to the foreign deemed income, subsection (2) of that section has effect with the omission of paragraph (b)."

*The Settlements Legislation*

256. Chapter 5 of Part 5 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005") imposes a charge to tax on income which is treated as arising to a settlor where they have retained an interest in the property from which the income arises.

257. Section 619 ITTOIA 2005 imposes a charge to tax on income which is treated as arising to a settlor under s 624 as:

"**Section 619 – Charge to tax under Chapter 5**
(1) Income tax is charged on–
(a) income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest),
…"

258. The definitions of "settlement" and "settlor" for the purposes of the Settlements Legislation are contained in s 620 ITTOIA 2005. The definition of settlement includes any arrangement and the definition of settlor includes a person who has provided funds directly or indirectly for the purposes of the settlement. So far as relevant, s 620 provides:

"**Section 620 – Meaning of "settlement" and "settlor"**
(1) In this Chapter–
"settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets …, and
"settlor", in relation to a settlement, means any person by whom the settlement was made.
(2) A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.
(3) A person is, in particular, treated as having made a settlement if the person–
(a) has provided funds directly or indirectly for the purpose of the settlement,
(b) has undertaken to provide funds directly or indirectly for the purpose of the settlement, or
(c) has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.

(4) This Chapter applies to settlements wherever made.
(5) …"

259. Pursuant to s 622 ITTOIA 2005, the person liable for any tax charged is the settlor. Section 624 ITTOIA 2005, provides that income, which arises under a settlement, is treated as income of the settlor and of the settlor alone if it arises (i) during the life of the settlor and (ii) from property in which the settlor has an interest as follows:

"**Section 624 – Income where settlor retains an interest**
(1) Income which arises under a settlement is treated for income tax purposes as the income of the settlor and of the settlor alone if it arises–
(a) during the life of the settlor, and
(b) from property in which the settlor has an interest.
(1A) If the settlement is a trust, expenses of the trustees are not to be used to reduce the income of the settlor.
(2) For more on a settlor having an interest in property, see section 625.
(3) For exceptions to the rule in subsection (1), see–
section 626 (exception for outright gifts between spouses or civil partners),
section 627 (exceptions for certain types of income), and
section 628 (exception for gifts to charities)."

260. Section 625 ITTOIA 2005 sets out the circumstances in which a settlor is to be regarded as having an interest in property, which includes where the property or any related property (including income from that property) is or may be payable to the settlor or applicable for the settlor's benefit as follows:

**"Section 625 - Settlor's retained interest**
(1) A settlor is treated for the purposes of section 624 as having an interest in property if there are any circumstances in which the property or any related property–
(a) is payable to the settlor or the settlor's spouse or civil partner,
(b) is applicable for the benefit of the settlor or the settlor's spouse or civil partner, or
(c) will, or may, become so payable or applicable.
…
(5) In this section "related property", in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it."

261. Section 648 ITTOIA 2005 provides that, if the remittance basis applies to the settlor, then the Settlements Legislation applies to relevant foreign income that is remitted to the UK in that tax year or any subsequent tax year as follows:

"**Section 648 – Income arising under a settlement**
(1) References in this Chapter to income arising under a settlement include–
(a) any income chargeable to income tax by deduction or otherwise, and
(b) any income which would have been so chargeable if it had been received in the United Kingdom by a person domiciled and resident there.
(2) But if, in a tax year, the settlor is not UK resident, references in this Chapter to income arising under a settlement do not include income arising

under the settlement in that tax year in respect of which the settlor, if actually entitled to 27 OFFICIAL it, would not be chargeable to income tax by deduction or otherwise because of not being UK resident.
(3) And if, for a tax year, section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the settlor, references in this Chapter to income arising under a settlement include in relation to any relevant foreign income arising under the settlement in that tax year only such of it as is remitted to the United Kingdom (in that tax year or any subsequent tax year) in circumstances such that, if the settlor remitted it, the settlor would be chargeable to income tax."

*Remittance basis*

262. The remittance basis provisions are set out in Chapter A1 Part 14 ITA 2007. A claim for the remittance basis provides for an alternative basis of charge to UK tax. Section 809F of Chapter 1A Part 14 ITA 2007 explains the effect on what is chargeable if the remittance basis applies.

263. In summary, in respect of non-UK domiciled individuals to whom the remittance basis applies, for any tax year for which the individual is UK resident, income tax is charged on the full amount of so much (if any) of the relevant foreign income (meaning income that arises from a source outside the UK) as is remitted to the UK in that year. Chargeable gains are treated as accruing to the individual in any tax year in which any of the foreign chargeable gains (meaning gains accruing from the disposal of an asset which is situated outside the UK) are remitted to the UK.

264. Where the remittance basis applies, section 830 ITTOIA 2005 provides that 'relevant foreign income' is income that arises from a source outside of the UK and is chargeable under (inter alia) section 832 as follows:

"**Section 832 – Relevant foreign income charged on remittance basis**
(1) This section applies to an individual's relevant foreign income for a tax year ("the relevant foreign income") if section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the individual for that year.
(2) For any tax year for which the individual is UK resident, income tax is charged on the full amount of so much (if any) of the relevant foreign income as is remitted to the United Kingdom—
(a) in that year, or
(b) in the UK part of that year, if that year is a split year as respects the individual.
(3) Subsection (2) applies whether or not the source of the income exists when the income is remitted.
(4) See Chapter A1 of Part 14 of ITA 2007 for the meaning of "remitted to the United Kingdom" etc."

265. "Remitted to the UK" is defined by s 809L ITA 2007 to include money or property brought to or received in the UK by or for the benefit of a relevant person (as defined in s809M) as follows:

"**Section 809L – Meaning of "remitted to the United Kingdom"**

(1) An individual's income is, or chargeable gains are, “remitted to the United Kingdom” if–
(a) conditions A and B are met,
(b) condition C is met, or
(c) condition D is met.
(2) Condition A is that–
(a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or 28 OFFICIAL (b) a service is provided in the United Kingdom to or for the benefit of a relevant person.
(3) Condition B is that–
(a) the property, service or consideration for the service is (wholly or in part) the income or chargeable gains,
(b) the property, service or consideration–
(i) derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and
(ii) in the case of property or consideration, is property of or consideration given by a relevant person,
(c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or
(d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c).
(4) Condition C is that qualifying property of a gift recipient–
(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person,
(b) is consideration for a service that is enjoyed in the United Kingdom by a relevant person, or
(c) is used outside the United Kingdom (directly or indirectly) in respect of a relevant debt.
(5) Condition D is that property of a person other than a relevant person (apart from qualifying property of a gift recipient)–
(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person,
(b) is consideration for a service that is enjoyed in the United Kingdom by a relevant person, or
(c) is used outside the United Kingdom (directly or indirectly) in respect of a relevant debt,
in circumstances where there is a connected operation.
…
**Section 809M – Meaning of “relevant person”**
(1) This section applies for the purposes of this Chapter.
(2) A “relevant person” is–
(a) the individual,
(b) the individual's husband or wife,
(c) the individual's civil partner,
(d) a child or grandchild of a person falling within any of paragraphs (a) to (c), if the child or grandchild has not reached the age of 18,
(e) a close company in which a person falling within any other paragraph of this subsection is a participator or a company which is a 51% subsidiary of such a close company, 29 OFFICIAL (f) a company in which a person falling within any other paragraph of this subsection is a participator, and which

would be a close company if it were resident in the United Kingdom, or a company which is a 51% subsidiary of such a company,
(g) the trustees of a settlement of which a person falling within any other paragraph of this subsection is a beneficiary, or
(h) a body connected with such a settlement.
…
(c) "close company" is to be read in accordance with Chapter 2 of Part 10 of CTA 2010 (see in particular section 439 of that Act),
(ca) "participator", in relation to a close company, means a person who is a participator in relation to the company for the purposes of section 455 of CTA 2010 (see sections 454 and 455(5) of that Act) and, in relation to a company that would be a close company if it were resident in the United Kingdom, means a person who would be such a participator if it were a close company,
(cb) "51% subsidiary" has the same meaning as in the Corporation Tax Acts (see Chapter 3 of Part 24 of CTA 2010),
(d) "settlement" and "settlor" have the same meaning as in Chapter 2 of Part 9,
(e) "beneficiary", in relation to a settlement, means any person who receives, or may receive, any benefit under or by virtue of the settlement,
(f) "trustee" has the same meaning as in section 993 (see, in particular, section 994(3)), and
(g) a body is "connected with" a settlement if the body falls within section 993(3)(c), (d), (e) or (f) as regards the settlement."

*Taxation of Chargeable Gains Act 1992*

266. During the 2016-17 tax year, s13 Taxation of Chargeable Gains Act 1992 ("TCGA 1992") applied to attribute the gains of a non-resident company which would be a close company (if it were resident in the UK) to its participators (or, if the participator were itself a company that would be a close company, to the participators of that company, and so on), including to the trustees of a non-resident trust as follows:

"**Section 13 – Attribution of gains to members of non-resident companies.**
(1) This section applies as respects chargeable gains accruing to a company—
(a) which is not resident in the United Kingdom, and
(b) which would be a close company if it were resident in the United Kingdom.
…
(2) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident in the United Kingdom and is a participator in the company, shall be treated for the purposes of this Act as if a part of the chargeable gain had accrued to him.
(3) That part shall be equal to the proportion of the gain that corresponds to the extent of the participator's interest as a participator in the company.
…
(5) This section shall not apply in relation to—
(b) a chargeable gain accruing on the disposal of an asset used, and used only–

(i) for the purposes of a trade carried on by the company wholly outside the United Kingdom, or
(ii) for the purposes of the part carried on outside the United Kingdom of a trade carried on by the company partly within and partly outside the United Kingdom, or
(ca) a chargeable gain accruing on the disposal of an asset used, and used only, for the purposes of economically significant activities carried on by the company wholly or mainly outside the United Kingdom, or
(cb) a chargeable gain accruing to the company on a disposal of an asset where it is shown that neither—
(i) the disposal of the asset by the company, nor
(ii) the acquisition or holding of the asset by the company, formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax, or
(d) to a chargeable gain in respect of which the company is chargeable to tax by virtue of section 10B.
…
(9) If a person who is a participator in the company at the time when the chargeable gain accrues to the company is itself a company which is not resident in the United Kingdom but which would be a close company if it were resident in the United Kingdom, an amount equal to the amount apportioned under subsection (3) above out of the chargeable gain to the participating company's interest as a participator in the company to which the gain accrues shall be further apportioned among the participators in the participating company according to the extent of their respective interests as participators, and subsection (2) above shall apply to them accordingly in relation to the amounts further apportioned, and so on through any number of companies.
(10) The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include the trustees of a settlement who are participators in the company, or in any company amongst the participators in which the gain is apportioned under subsection (9) above, if when the gain accrues to the company the trustees are not resident in the United Kingdom.
…
(12) In this section `participator', in relation to a company, has the same meaning given by section 454 of CTA 2010.
(13) In this section—
(a) references to a person's interest as a participator in a company are references to the interest in the company which is represented by all the factors by reference to which he falls to be treated as such a participator; and
(b) references to the extent of such an interest are references to the proportion of the interests as participators of all the participators in the company (including any who are not resident in the United Kingdom) which on a just and reasonable apportionment is represented by that interest.
(14) For the purposes of this section, where—
(a) the interest of any person in a company is wholly or partly represented by an interest which he has under any settlement (`his beneficial interest'), and
(b) his beneficial interest is the factor, or one of the factors, by reference to which that person would be treated (apart from this subsection) as having an interest as a participator in that company, the interest as a participator in that company which would be that person's shall be deemed, to the extent that it is

represented by his beneficial interest, to be an interest of the trustees of the settlement (and not of that person), and references in this section, in relation to a company, to a participator shall be construed accordingly."

267. Section 87 TCGA 1992 provides that the gains of a non-resident trust are treated as accruing to a beneficiary of a settlement who has received a capital payment from the trustees in the relevant tax year or any earlier tax year as follows:

"**Section 87 – Non-UK resident settlements: attribution of gains to beneficiaries**
(1) This section applies to a settlement for a tax year ("the relevant tax year") if there is no time in that year when the trustees are resident in the United Kingdom.
(2) Chargeable gains are treated as accruing in the relevant tax year to a beneficiary of the settlement who has received a capital payment from the trustees in the relevant tax year or any earlier tax year if all or part of the capital payment is matched (under section 87A as it applies for the relevant tax year) with the section 2(2) amount for the relevant tax year or any earlier tax year.
(3) The amount of chargeable gains treated as accruing is equal to–
(a) the amount of the capital payment, or
(b) if only part of the capital payment is matched, the amount of that part.
(4) The section 2(2) amount for a settlement for a tax year for which this section applies to the settlement is– 32 OFFICIAL (a) the amount upon which the trustees of the settlement would be chargeable to tax under section 2(2) for that year if they were resident in the United Kingdom in that year, or
(b) if section 86 applies to the settlement for that year, the amount mentioned in paragraph (a) minus the total amount of chargeable gains treated under that section as accruing in that year.
(5) The section 2(2) amount for a settlement for a tax year for which this section does not apply to the settlement is nil.
…"

268. The amount of chargeable gains treated as accruing is the part of the capital payment that can be matched under s 87A TCGA 1992 which provides as follows:

"**Section 87A – Section 87: matching**
(1) This section supplements section 87.
(2) The following steps are to be taken for the purposes of matching capital payments with section 2(2) amounts.
**Step 1**
Find the section 2(2) amount for the relevant tax year.
**Step 2**
Find the total amount of capital payments received by the beneficiaries from the trustees in the relevant tax year.
**Step 3**
The section 2(2) amount for the relevant tax year is matched with–
(a) if the total amount of capital payments received in the relevant tax year does not exceed the section 2(2) amount for the relevant tax year, each capital payment so received, and
(b) otherwise, the relevant proportion of each of those capital payments.

"The relevant proportion" is the section 2(2) amount for the relevant tax year divided by the total amount of capital payments received in the relevant tax year.

**Step 4**

If paragraph (a) of Step 3 applies–

(a) reduce the section 2(2) amount for the relevant tax year by the total amount of capital payments referred to there, and

(b) reduce the amount of those capital payments to nil.

If paragraph (b) of that Step applies–

(a) reduce the section 2(2) amount for the relevant tax year to nil, and

(b) reduce the amount of each of the capital payments referred to there by the relevant proportion of that capital payment.

**Step 5**

Start again at Step 1 (unless subsection (3) applies). If the section 2(2) amount for the relevant tax year (as reduced under Step 4) is not nil, read references to capital payments received in the relevant tax year as references to capital payments received in the latest tax year which–

(a) is before the last tax year for which Steps 1 to 4 have been undertaken, and

(b) is a tax year in which capital payments (the amounts of which have not been reduced to nil) were received by beneficiaries.

If the section 2(2) amount for the relevant tax year (as so reduced) is nil, read references to the section 2(2) amount for the relevant tax year as the section 2(2) amount for the latest tax year–

(a) which is before the last tax year for which Steps 1 to 4 have been undertaken, and

(b) for which the section 2(2) amount is not nil.

(3) This subsection applies if–

(a) all of the capital payments received by beneficiaries from the trustees in the relevant tax year or any earlier tax year have been reduced to nil, or

(b) the section 2(2) amounts for the relevant tax year and all earlier tax years have been reduced to nil.

(4) The effect of any reduction under Step 4 of subsection (2) is to be taken into account in any subsequent application of this section."

269. Section 96 TCGA 1992 provides that certain payments received from or by close companies are treated as being received by a person from trustees of a settlement as follows:

"**Section 96 — Payments by and to companies**

(1) Where a capital payment is received from a qualifying company which is controlled by the trustees of a settlement at the time it is received, for the purposes of sections 87 to 90 and Schedule 4C it shall be treated as received from the trustees.

(2) Where a capital payment is received from the trustees of a settlement (or treated as so received by virtue of subsection (1) above) and it is received by a non-resident qualifying company, the rules in subsections (3) to (6) below shall apply for the purposes of sections 87 to 90 and Schedule 4C.

(3) If the company is controlled by one person alone at the time the payment is received, and that person is then resident in the United Kingdom, it shall be treated as a capital payment received by that person.

(4) If the company is controlled by 2 or more persons (taking each one separately) at the time the payment is received, then—
(a) if one of them is then resident in the United Kingdom, it shall be treated as a capital payment received by that person;
(b) if 2 or more of them are then resident in the United Kingdom ("the residents") it shall be treated as being as many equal capital payments as there are residents and each of them shall be treated as receiving one of the payments.
(5) If the company is controlled by 2 or more persons (taking them together) at the time the payment is received —
(a) it shall be treated as being as many capital payments as there are participators in the company at the time it is received, and
(b) each such participator (whatever his residence) shall be treated as receiving one of the payments, quantified on the basis of a just and reasonable apportionment,
but where (by virtue of the preceding provisions of this subsection and apart from this provision) a participator would be treated as receiving less than one-twentieth of the payment actually received by the company, he shall not be treated as receiving anything by virtue of this subsection.
(6) For the purposes of subsection (1) above a qualifying company is a close company or a company which would be a close company if it were resident in the United Kingdom.
(7) For the purposes of subsection (1) above a company is controlled by the trustees of a settlement if it is controlled by the trustees alone or by the trustees together with a person who (or persons each of whom) falls within subsection (8) below.
(8) A person falls within this subsection if—
(a) he is a settlor in relation to the settlement, or
(b) he is connected with a person falling within paragraph (a) above.
(9) For the purposes of subsection (2) above a non-resident qualifying company is a company which is not resident in the United Kingdom and would be a close company if it were so resident.
…
(10) For the purposes of this section—
(a) the question whether a company is controlled by a person or persons shall be construed in accordance with sections 450 and 451 of CTA 2010, but in deciding that question for those purposes no rights or powers of (or attributed to) an associate or associates of a person shall be attributed to him under section 451(4) to (6) of CTA 2010]9 if he is not a participator in the company;
(b) "participator" has the meaning given by section 454 of CTA 2010.
(11) This section shall apply to payments received on or after 19th March 1991."

270. On a part disposal of an asset, s 42 TCGA 1992 provides a formula for computing the gain on the part disposal as follows:

"**Section 42 — Part disposals**
(1) Where a person disposes of an interest or right in or over an asset, and generally wherever on the disposal of an asset any description of property derived from that asset remains undisposed of, the sums which under paragraphs (a) and (b) of section 38(1) are attributable to the asset shall, both

for the purposes of the computation of the gain accruing on the disposal and for the purpose of applying this Part in relation to the property which remains undisposed of, be apportioned.
(2) The apportionment shall be made by reference—
(a) to the amount or value of the consideration for the disposal on the one hand (call that amount or value A), and
(b) to the market value of the property which remains undisposed of on the other hand (call that market value B),
and accordingly the fraction of the said sums allowable as a deduction in the computation of the gain accruing on the disposal shall be—

$$\frac{A}{A + B}$$

and the remainder shall be attributed to the property which remains undisposed of.
(3) Any apportionment to be made in pursuance of this section shall be made before operating the provisions of section 41 and if, after a part disposal, there is a subsequent disposal of an asset the capital allowances or renewals allowances to be taken into account in pursuance of that section in relation to the subsequent disposal shall, subject to subsection (4) below, be those referable to the sums which under paragraphs (a) and (b) of section 38(1) are attributable to the asset whether before or after the part disposal, but those allowances shall be reduced by the amount (if any) by which the loss on the earlier disposal was restricted under the provisions of section 41.
(4) This section shall not be taken as requiring the apportionment of any expenditure which, on the facts, is wholly attributable to what is disposed of, or wholly attributable to what remains undisposed of.
(5) It is hereby declared that this section, and all other provisions for apportioning on a part disposal expenditure which is deductible in computing a gain, are to be operated before the operation of, and without regard to, section 58(1), sections 152 to 158 (but without prejudice to section 152(10)), section 171(1) or any other enactment making an adjustment to secure that neither a gain nor a loss occurs on a disposal."

### *Discussion and Decision*

271. Mr Firth, on behalf of the Respondent, submitted that Officer Jackson's belief that tax was at risk (that income tax and CGT was due) was not only unreasonable but wrong in law. Likewise, he submitted that the Tribunal could not lawfully form a view that any tax was at risk. Mr Firth's submissions, can be summarised as follows.

*Tax at risk: Transfer of Assets Abroad Legislation*

272. Mr Firth noted that HMRC had asserted that the Respondent was a transferor for the purposes of the transfer of asset abroad rules on the basis of the ledgers regarding the Taj Trust. HMRC had referred to transfers from the Respondent's personal account in 2005-06 and loans from the Respondent between 2004 and 2006.

273. Mr Firth submitted that even if HMRC's interpretation of that document was correct (which it was not), that says nothing about the application of the motive defence. The Respondent was non-resident in the UK prior to 2010-11. In those circumstances,

he submitted that it is not apparent what tax avoidance is alleged to underpin the structure.

274. He submitted that HMRC had sought to relegate this fundamental issue to a footnote in their skeleton argument as follows:

> "For completeness, there is no evidence the motive defence would apply in the present case. Absent any evidence, it is difficult to conclude that a structure that largely holds UK properties and businesses was established offshore for commercial/non-tax reasons. In addition, there is some direct evidence of tax motivation in the email from Steve Woolridge to George Colegate, John Prior and Ralph De Souza (of Leigh Carr) dated 12 June 2014 "Sokhi [The Respondent] would like to buy this land in one of his offshore (Seychelles) companies Frisco Capital Limited due to the profits which will result and be retained offshore."

275. Mr Firth submitted that this is misconceived. First, at the times when HMRC say the Respondent made transfers, he was non-resident. Accordingly, if the Respondent had owned the assets himself, they would still have been owned by a non-resident.

276. Second, Mr Firth submitted that HMRC had failed to pay any attention to the distinction between tax avoidance and tax mitigation. An observation that non-residents are liable to less tax than UK residents is hopelessly inadequate to demonstrate avoidance. It reflects a deliberate choice of Parliament as to how it wishes to tax non-resident persons.

277. Third, Mr Firth submitted that in fact, all companies in the structure paid UK tax on their UK income. The UK businesses were held by the UK resident branch of the structure and the non-resident companies which owned UK properties paid tax under the non-resident landlord scheme.

278. He submitted that HMRC were now trying to tax the Respondent on income in respect of which UK tax has already been paid by the recipient (or which would not have been taxable at all in an on-shore structure as a result of the intra-group dividends).

279. In any event, Mr Firth submitted that the Respondent was not a transferor to the Taj Trust. The funds HMRC say were the relevant transfers by the Respondent were, in fact, the transfer of the Trust's own money which had arisen from Midland Housing Consortium as dividend and, subsequently, as proceeds of sale. The total of £1.4 million is equal to the amounts HMRC say the Respondent contributed (given the $ exchange rate at the time was approximately 2:1). Accordingly, it is wrong to say that the Respondent was the economic settlor of the Taj Trust.

*Tax at risk: the remittance basis*

280. Mr Firth noted that HMRC were aware of and rely on this type of arrangement in respect of Normandy Group Limited. He submitted that HMRC's case on the remittance basis amounts to little more than speculation. The allegation that they cannot make this case because the Respondent failed to comply with the information request is incorrect

given that the information request does not ask for information about remittances but only asked about the Taj Trust.

281. Mr Firth submitted that the attempt to limit the Respondent to the remittance basis in respect of 2016-17 only is also incorrect. HMRC say that that is the only year for which there is a claim. What is overlooked is the fact that if HMRC were to assess the Respondent (or issue a closure notice) the Respondent would be entitled to make a claim then (TMA 1970, s 36(3) and s 43A(2)). Accordingly, the remittance basis remains in issue for all years.

*Tax at risk: Settlements Legislation*

282. Mr Firth submitted that HMRC's case in respect of the settlements anti-avoidance legislation is misconceived for (at least) two reasons. First, they neither plead nor seek to establish the requisite element of bounty that the case law shows is necessary.

283. Second, HMRC are seeking to tax payments or transfers between companies underlying the trust structure, rather than income arising to the trust itself. That is wrong. The income of the settlement is only the income arising to the trust (if any).

284. Mr Firth submitted that this is well understood, including by HMRC who in a recent response to a consultation on the taxation of non-domiciles have observed that the settlements legislation only applies to income arising to a settlement.

*Tax at risk: Taxation of Chargeable Gains Act (TCGA) s.87*

285. Mr Firth submitted that HMRC's reliance on s 87 TCGA also fails for a number of reasons.

286. First, settlement takes its meaning from the income tax settlement anti-avoidance rules (TCGA 1992 s.97(7)) and thus requires bounty. HMRC have neither pleaded nor sought to establish that.

287. Second, there have been no distributions to the Respondent and HMRC do not suggest any.

288. Third, in any event, all s 87 deemed gains are treated as foreign gains (s 87B(2)) and, again, HMRC have not demonstrated any remittance.

*Causal connection between failure to comply (if established) and underpayment of tax*

289. Mr Firth submitted that HMRC's case on tax at risk hinges on questions such as tax avoidance motive and remittance of underlying income that they have not asked questions about in the Information Notice. The Information Notice sought a very narrow range of information regarding the Taj Trust. There is thus no basis for asserting a causal connection even if there had been a failure to provide information.

*Inability of HMRC to pursue a Paragraph 50 penalty related to tax in respect of which HMRC have subsequently made assessments or issued closure notices*

290. Mr Firth noted that HMRC have subsequently made protective discovery assessments in relation to income tax and CGT for the relevant years in very similar amounts and on a very similar basis to the tax at risk which Officer Jackson relies upon.

291. He therefore submitted that the amount of tax which has or is likely to be paid for the purposes of Paragraphs 50(1)(c) and 50(3) cannot therefore be lower than it would have been but for the information requested and allegedly not supplied under the Information Notice where HMRC have actually assessed the same tax. Once HMRC have raised an assessment this takes it out of tax at risk calculation and brings it into an assessment (and any challenge thereto).

292. His submission was that this was a point of principle. HMRC cannot pursue the same tax at risk as has now been assessed. He submitted that in order for HMRC to have raised assessments, they must have bona fide belief and sufficient evidence based on officer's objective view that assessments could be raised. He submitted that HMRC must have come to this view notwithstanding the alleged non-compliance by the Respondent and significance of the material sought by the Information Notice.

293. Mr Firth submitted that if such discovery assessments are not appealed then the tax becomes due and there is a charge to tax – therefore there is no tax unlikely to be paid – HMRC have made the tax safe. Even if the tax liability has not been discharged and if there is any challenge to the assessments on the appeal, the burden will be on the Respondent (as an appellant) to disprove that the tax is due. In those proceedings before the FTT, if it was alleged that a document was not disclosed by a taxpayer then this would be quite a serious allegation and there would be a mechanism for its disclosure to be ordered. Therefore in the circumstances where HMRC have issued assessments for the same or similar tax at risk, it is not possible for the Upper Tribunal to be satisfied for the purposes of Paragraph 50 that as a result of non-compliance with any Information Notice that the amount of tax the Respondent has or would be likely to pay would be lower.

***The Tribunal's analysis and determination***

294. We reject each of Mr Firth's submissions and accept that Officer Jackson has correctly applied the relevant law in forming his belief that there was tax at risk as result of the Respondent's non-compliance with the Information Notice.

295. We set out our reasons for that conclusion by reference to the issues in dispute as set out at [150] above.

<u>Income Tax</u>

*Transfer of Assets Abroad Legislation*

*Was the Respondent a transferor for the purpose of the Transfer of Assets Abroad Legislation?*

296. For the reasons we have given above, we are satisfied that Officer Jackson reasonably concluded that the Respondent was the economic settlor of the Taj Trust. Given the evidence available to Officer Jackson at the time of the application (and still available), which strongly indicates that the Respondent contributed significant funds to the Trust, for the reasons we set out above in our findings of fact we are satisfied he had reason to believe that the Respondent was the economic settlor of the Trust.

297. Further or alternatively, the concept of transferor for the purpose of the Transfer of Assets Abroad legislation is wider than that of a person contributing their own funds to a trust:

> (1) On any basis, we find that the funds contributed to the Taj Trust came from the Respondent's bank account(s) (even if, as is suggested, the funds were held in his bank account on behalf of a company). The Respondent evidently had control of the funds in those accounts as they were his personal accounts. Absent any evidence that he was directed by someone else to transfer those funds, that is sufficient to establish him as the transferor in relation to those funds for the purposes of the Transfer of Assets Abroad Legislation.
>
> (2) Loans are also transfers of assets for the purposes of the Transfer of Assets Abroad Legislation, and it is common ground that the Respondent has made significant loans to the Taj Trust, in respect of which he is the transferor.

298. Accordingly, we find that the Respondent was, subject to the motive defence considered below, a transferor for the purposes of the Transfer of Assets Abroad Legislation in respect of the transactions relied on by Officer Jackson.

*Motive Defence*

299. The Respondent contends that the motive defence would apply to exempt the charge to income tax under s 720 ITA 2007. Given that the transactions that give rise to income arising potentially occurred both before and after 2005, the motive defences in both s 737 and s 739 ITA 2007, as set out below, are potentially applicable:

> "**Section 736 – Exemptions: introduction**
> (1) Sections 737 to 742A deal with exemptions from liability under this Chapter.
> (2) Some exemptions apply according to whether the relevant transactions are all pre-5 December 2005 transactions or all post-4 December 2005 transactions or include both (see sections 737, 739 and 740).
> (2A) The exemption given by section 742A applies only in the case of a relevant transaction effected on or after 6 April 2012.
> (3) In this section and sections 737 to 742–
> "post-4 December 2005 transaction" means a relevant transaction effected on or after 5 December 2005, and
> "pre-5 December 2005 transaction" means a relevant transaction effected before 5 December 2005.

**Section 737 – Exemption: all relevant transactions post-4 December 2005 transactions**

(1) This section applies if all the relevant transactions are post-4 December 2005 transactions.

(2) An individual is not liable to income tax under this Chapter for the tax year by reference to the relevant transactions if the individual satisfies an officer of Revenue and Customs–

(a) that Condition A is met, or

(b) in a case where Condition A is not met, that Condition B is met.

(3) Condition A is that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.

(4) Condition B is that–

(a) all the relevant transactions were genuine commercial transactions (see section 738), and

(b) it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.

(5) In determining the purposes for which the relevant transactions or any of them were effected, the intentions and purposes of any person within subsection (6) are to be taken into account.

(6) A person is within this subsection if, whether or not for consideration, the person–

(a) designs or effects, or

(b) provides advice in relation to,

the relevant transactions or any of them.

(7) In this section–

"revenue" includes taxes, duties and national insurance contributions,

"taxation" includes any revenue for whose collection and management the Commissioners for Her Majesty's Revenue and Customs are responsible.

(8) If–

(a) apart from this subsection, an associated operation would not be taken into account for the purposes of this section, and

(b) the conditions in subsections (2) to (4) are not met if it is taken into account, because of–

(i) the associated operation, or

(ii) the associated operation taken together with any other relevant transactions,

it must be taken into account for those purposes.

**Section 738 – Meaning of "commercial transaction"**

(1) For the purposes of section 737, a relevant transaction is a commercial transaction only if it meets the conditions in subsections (2) and (3).

(2) It must be effected–

(a) in the course of a trade or business and for its purposes, or

(b) with a view to setting up and commencing a trade or business and for its purposes.

(3) It must not–

(a) be on terms other than those that would have been made between persons not connected with each other dealing at arm's length, or

(b) be a transaction that would not have been entered into between such persons so dealing.
(4) For the purposes of subsection (2), making investments, managing them or making and managing them is a trade or business only so far as–
(a) the person by whom it is done, and
(b) the person for whom it is done,
are persons not connected with each other and are dealing at arm's length.

**Section 739 – Exemption: all relevant transactions pre-5 December 2005 transactions**
(1) This section applies if all the relevant transactions are pre-5 December 2005 transactions.
(2) An individual is not liable for income tax under this Chapter for the tax year by reference to the relevant transactions if the individual satisfies an officer of Revenue and Customs that condition A or B is met.
(3) Condition A is that the purpose of avoiding liability to taxation was not the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.
(4) Condition B is that the transfer and any associated operations–
(a) were genuine commercial transactions, and
(b) were not designed for the purpose of avoiding liability to taxation.

**Section 740 – Exemption: relevant transactions include both pre-5 December 2005 and post-4 December 2005 transactions**
(1) This section applies if the relevant transactions include both pre-5 December transactions and post-4 December transactions.
(2) An individual is not liable to tax under this Chapter for the tax year by reference to the relevant transactions if–
(a) the condition in section 737(2) (exemption where all relevant transactions are post-4 December 2005 transactions) is met by reference to the post-4 December 2005 transactions, and
(b) the condition in section 739(2) (exemption where all relevant transactions are pre-5 December 2005 transactions) is met by reference to the pre-5 December transactions.
(3) If subsection (2)(b) applies but subsection (2) (a) does not, this Chapter applies with the modifications in subsections (4) to (6).
(4) For the purposes of sections 720 to 730, any income arising before 5 December 2005 must not be brought into account as income of the person abroad.
(5) In determining the relevant income of an earlier tax year for the purposes of section 733(1) (see Step 4), it does not matter whether that year was a year for which the individual was not liable under section 731 because of section 739 or this section.
(6) For the purposes of Step 1 in section 733(1), a benefit received by the individual in or before the tax year 2005-06 is to be left out of account.
(7) But, in the case of a benefit received in the tax year 2005-06, subsection (6) applies only so far as, on a time apportionment basis, the benefit fell to be enjoyed in any part of the year that fell before 5 December 2005."

300. The Respondent sought to raise the motive defence by reference to the following matters:

(1) HMRC have not stated that the Respondent was UK resident prior to 2011, and therefore the Respondent was not UK resident at the time of the transfers.

(2) Accordingly, had he not made the transfers then the assets would still have been owned by a non-resident.

(3) The fact non-residents are liable to less tax than UK residents is inadequate to demonstrate avoidance but is instead a deliberate choice of Parliament.

(4) All companies in the structure paid UK tax on their UK income (under the non-resident landlord scheme).

301. The primary difficulty with this analysis is that it comprises speculation and assertion that are contradicted by the evidence. In particular, the Respondent was born in the UK and was UK resident until at least 1997 (it appears from his witness statement that he was living in the UK with his wife). He stated in his witness statement that he was only "visiting" India when the Taj Trust was established. In addition, since 2004 the Taj Trust was the beneficial owner of multiple UK properties and UK companies of which The Respondent became a consultant, and he returned to the UK in (at the latest) 2010. There is no positive evidence that the Respondent intended to remain non-UK resident, and his subsequent conduct indicates that this was not the case.

302. In these circumstances there are obvious tax advantages that might have been envisaged to arise if the activities and investments made by the companies were being undertaken by offshore entities, rather than being owned by the Respondent personally, in particular for an individual who claims to be non-UK domiciled.

303. It is not the case that all companies in the structure paid UK tax on their UK income. Neither Holdenby Properties Limited nor Berkeley Estates Properties Limited filed non-resident landlord returns for the years 2013-2014, 2014-15 or 2015-16, notwithstanding that Leigh Carr have confirmed that the income received by Frisco Capital Limited related to the same properties previously owned by Holdenby and Berkeley.

304. By having UK source income arise to non-resident companies held by a non-resident trust, the Respondent could receive that income as foreign source income (dividends from non-resident companies and distributions from a non-resident rather than UK source income), and thereby avoid UK income tax (and with the income only bearing corporation tax at a lower rate than income tax or basic rate income tax paid under the non-resident landlords scheme).

305. The vast majority of the income that HMRC have identified as chargeable under s 720 ITA 2007 is non-UK source, in particular dividends declared by non-resident companies. No UK tax has been paid on that income, which would have been subject to UK income tax had it been received by the Respondent in 2013-14 – 2015-16 (and subject to UK income tax in 2016-17 if remitted to the UK).

306. The Respondent submits that the mere fact that non-residents are liable to less tax than UK residents is not avoidance but a deliberate choice of Parliament as to how it

wishes to tax non-resident persons. The mere fact that non-residents may not be liable to UK tax is not avoidance, but the transfer of assets to a non-resident trustee or company in order to mitigate potential UK tax is not a deliberate choice of Parliament: indeed, it is precisely what the Transfer of Assets Abroad Legislation is intended to prevent.

307. To the extent necessary, it is a reasonable inference that an individual with considerable ties to the UK, and who subsequently became UK resident, would have been motivated by UK tax considerations when transferring assets to a non-UK trust.

308. Moreover, there is some direct evidence of tax motivation in the email from Steve Woolridge quoted at [273] above. This email demonstrates that the Respondent was using the offshore structure as his own non-UK investment vehicle in order to keep profits offshore.

309. In *Burns v Revenue and Customs Commissioners* [2009] STC (SCD) 165, the taxpayers had transferred their interests in certain settlements to Jersey companies at a time when they were Jersey resident. The Special Commissioner dismissed the taxpayers' reliance on the motive defence holding that (i) a transaction designed to reduce income tax by the mechanism of the transfer of an asset to a non-resident person is not mere mitigation for the purposes of the Transfer of Assets Abroad legislation, and (ii) where the asset held remains the same and the primary change is in the nature of ownership, that crosses the border between mitigation and avoidance. He said:

> "57. Finally I deal with the question of whether tax planning to achieve the two advantages contended by the respondents in this case fall into the category of tax avoidance or mere mitigation.
>
> 58. I deal first with the feature of trying to cap the level of charge to income tax at the basic rate. This advantage seems to me to be in the category of tax avoidance. I entirely accept that, under s 739, tax advantages that have nothing to do with income tax can be the relevant advantages that occasion (or fail to preclude) liability under s 739. In the context of the section, and of the wording in the preamble however, it seems to me to be difficult to argue that a transaction designed to reduce income tax by the mechanism of the transfer of UK property to a non-resident person (virtually a paraphrase of the opening wording of s 739) is mere mitigation.
>
> 59. I would certainly accept that if a non-domiciled person arranged to hold foreign situs, rather than UK situs, assets, and then died, no tax advantage would have been sought. Thus if a UK house was sold, and a French house purchased, that would simply be a case of genuinely changing the assets held, and were some s 739 point to hinge on whether the change was effected for the purpose of avoiding UK tax, the answer would be that it was not. And if UK bank deposits were withdrawn and deposits placed elsewhere, then again, that would be a pure investment switch, and not a step the purpose of which would involve the purpose of achieving a UK tax advantage. Indirectly retaining a UK real property, and simply achieving the technical change in status by putting the property into a non-UK resident company in a case where one of the purposes is to achieve the potential inheritance tax ('IHT') advantage,

> implicit by effecting those steps, does seem to me to cross the border between mitigation and tax avoidance. This is because it has involved no real change of investment, as in the two previous examples, but the retention of the UK property, accompanied by a step to change the normal tax consequences of that. Thus where it is shown that the CTT or IHT considerations were one of the purposes of the transfer, or rather where the appellants have not displaced the reasonable presumption that UK advantages were one of the purposes, I conclude that those purposes involve tax avoidance and not merely mitigation."

310. Overall, there is no evidence that the motive defence would be satisfied in the present case (and it certainly was not irrational for Officer Jackson to believe that it did not apply).

311. The burden of proving that the motive defence applies is borne by the taxpayer, as indicated by the fact that both the motive defences in s 737 and s 739 ITA 2007 only apply "if the individual satisfies an officer of Revenue and Customs" that the relevant conditions are satisfied. Since no evidence had been advanced to Officer Jackson as to the motives for the establishment of the offshore structure (and still no evidence of motive has been advanced), it was evidently both rational and correct for him to conclude that the conditions for the motive defence could not be met.

312. We are satisfied that the Respondent's reliance on the motive defence is bare assertion advanced in Mr Firth's argument: the Respondent has not advanced any evidence in relation to the motive defence. Indeed, he cannot do so: since his evidence is that he was not the transferor; he cannot simultaneously give evidence as to what his motives would have been had he been the transferor.

*Deductions for UK Tax Paid*

313. Mr Firth was correct to note that HMRC do generally give deductions in relation to any tax liability under the Transfer of Assets Abroad Legislation in circumstances in which UK tax has been paid by a different person.

314. However, (i) such deductions would only apply in the present case to UK source income on which UK tax has been paid (which is a small proportion of the total income chargeable under the Transfer of Assets Abroad Legislation) and (ii) the deduction would only be for tax paid at the lower rate of corporation tax or for basic rate income tax paid under the non-resident landlords scheme. Accordingly, the deductions available will have no effect on the vast majority of the liabilities arising under the Transfer of Assets Abroad Legislation. Such deductions are available for liabilities under the Transfer of Assets Abroad Legislation but are not available for income tax charges arising under the Settlements Legislation.

*Settlements Legislation*

*Application of the Settlements Legislation to corporate structure*

315. The Respondent relies on the judgment of the House of Lords in *Chamberlain v. CIR* 25 TC 317 ("*Chamberlain")* to submit that income arising to the companies held directly and indirectly by the trustee of the Taj Trust cannot be chargeable under the Settlements Legislation.

316. As a preliminary observation, at present it is unknown whether any of the income identified by HMRC has indeed been paid to the trustee of the Taj Trust, because the Respondent has not provided the trust accounts (as requested in the Information Notice). Therefore, it is possible that the provision of information will render the Respondent's particular argument redundant.

317. The facts of *Chamberlain* were that the taxpayer personally owned 35,000 shares in a company (Staffa), with minority shareholdings being held by trusts of which he was the settlor (he had provided funds to those trusts which the trustees had invested by purchasing minority shareholdings in Staffa). The trusts held different classes of shares (with different dividend rights). The arrangements that the taxpayer made were described by Lord Macmillan in his speech as follows:

> "What he did was as follows. He was the owner of 470 £1 shares in a successful building company known as Commercial Structures, Ltd. Being minded to make a provision for his wife and four children, he formed an unlimited company which he named the Staffa Investment Trust, with an initial capital of £100,000 divided into 50,000 preference shares of 105. each and 7,500 ordinary shares of £10 each. The company was incorporated on 20th December, 1935. On 23rd December, 1935, the Appellant by a sale agreement of that date sold to the company his 470 shares in Commercial Structures, Ltd., the price being satisfied by the issue to him of 35,000 preference shares of the company and as to the balance of £82,500 in cash, which the Appellant left on loan to the company without interest. The 470 shares in Commercial Structures, Ltd. were the only assets of the Staffa Investment company, and its income consisted solely of the dividends received on these shares. The constitution of the company was so framed as to give the Appellant complete control over it."

318. The Inland Revenue Commissioners sought to tax all income to Staffa (allowing deductions for dividends actually paid by Staffa to the taxpayer) on the basis that the trusts and the incorporation and structure of Staffa constituted an arrangement amounting to a "settlement" for the purposes of s41(4)(b) of the Finance Act 1938, notwithstanding that only a minority of the shares had been placed in trusts.

319. Section 41(4) provided:

> "For the purposes of this part of this Act
>
> ...

> (b) the expression "settlement" includes any disposition, trust, covenant, agreement or arrangement, and the expression" settlor " in relation to a settlement means any person by whom the settlement was made;
>
> (c) a person shall be deemed to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this paragraph) if he has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any ·other person a reciprocal arrangement for that other person to make or enter into the settlement"

320. The issue in *Chamberlain* was not whether the Staffa shares held by the trusts were settlements within the Settlements legislation; the question was whether the Staffa shares held by Mr Chamberlain personally (which comprised the vast majority of the share capital of the company) was within the Settlements Legislation. This was the question posed by Lord Thankerton at page 329:

> "Did the property comprised in the settlement consist of the whole assets of Staffa, or is the property comprised in the settlement to be found separately comprised in each of the five deeds of settlement, the formation of Staffa being part of the arrangement conceived by the Appellant, whereby a convenient and profitable investment was made available for the moneys respectively settled under the five deeds of settlement?"

321. Lord Thankerton's answer to this question was that the whole assets of Staffa did not form part of the property comprised in the settlement. He said this at page 329:

> "My Lords, I am of opinion that the latter alternative provides the correct view of the arrangement made by the Appellant, with a view to making provision for his children. While the formation of Staffa provided an available investment for the sums settled under the five deeds of settlement, under which the children's provisions were actually constituted, the continuance of such investment was not essential to the continuance of the trusts under the deeds of settlement. In other words, the sums settled under these deeds were the funds provided for the purpose of the settlement within the meaning of Section 41(4) (c). Staffa, though controlled by the Appellant, did not, in my opinion, hold its assets as part of the provisions settled on the children. I am of opinion that the whole assets of Staffa did not constitute the property comprised in the settlement, and that the assessment cannot stand."

322. As observed by Lord Thankerton, each case is apt to depend on its own facts, and other cases are not likely to be of material assistance. The reasoning in *Chamberlain* might support an argument that, where the assets held by a trust comprise only a minority shareholding in a company, the property of the settlement does not comprise the entire share capital of that company. However, it is not authority for the proposition that the only income of a settlement is only income arising to the trustees themselves (as is asserted by the Respondent).

323. The legislation (in particular s620(1) ITTOIA 2005) uses the term "settlement" which is a defined term that is significantly broader than a trust, which is only one of the (non-exhaustive) meanings given: "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets". This is a clear indication that

the term "settlement" is wider than a trust and, given the broad definition, income arising to an offshore structure is evidently capable of constituting income arising to a "settlement". Indeed, if the Respondent were correct it would lead to the surprising conclusion that any trust that wished to avoid the application of the Settlements Legislation merely had to form a holding company to hold all assets and receive any income arising.

324. In the present case, the Taj Trust is the indirect owner of the entire share capital of all of the companies, such that the trustee has control over all of those companies and their activities.

325. In those circumstances, we are satisfied that it is evident that the property comprised within the "settlement" comprises not only the shares that it holds directly, but also the shares held indirectly. See, for example, the discussion of *Chamberlain* in *Dunsby v HMRC* [2020] UKFTT 271 (TC), [2020] SFTD 991 at [94]-[104], in particular the principles at [104]:

> "The principles that I draw from the case law authorities are, therefore, as follows:
> (1) The definition of 'settlement' in s 620 ITTOIA is very broad and can encompass any arrangements under which income on property becomes payable to others. However, it is limited to cases that involve an 'element of bounty' or, as Lord Hoffmann put it in *Jones*, the arrangement must involve the provision of a benefit, which would not have been provided in a transaction at arm's length.
> (2) It is possible to find the element of bounty in a future uncertain event, which is not part of the arrangements that form the settlement, but was within the contemplation of the parties at the time of the settlement.
> (3) Steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the 'settlement'.
> (4) It is important to identify the property comprised in the settlement as this will also define the income of the settlement, which is subject to tax under the settlements legislation."

*Element of Bounty*

326. If the Respondent has provided property, directly or indirectly, to the Taj Trust, then we are satisfied that this provision meets the requirement that there is an "element of bounty".

327. The 'element of bounty' condition will be satisfied where there has been a provision of a benefit which would not have been provided at arm's length (*Dunsby* at [104(1)], relying on Lord Hoffman's speech in *Jones v. Garnett* [2007] UKHL 35, [2007] STC 1536).

328. The evidence in the present case demonstrates that the Respondent has provided significant contributions to the Taj Trust, in particular the initial substantive funds. These contributions evidently satisfy the "element of bounty" requirement.

*Remittance Basis*

*Would it be possible for the Respondent to make claims to be taxed on the remittance basis following assessment?*

329. It is not disputed that The Respondent has not claimed the remittance basis for the years 2013-14, 2014-15 and 2015-16. However, the Respondent argues that if HMRC were to assess him (or issue a closure notice) he would be entitled to make a claim then (TMA 1970, s.36(3) and s.43A(2)). Naturally this argument would only be relevant to income that is non-UK source income.

330. Section 36(3) TMA 1970 provides that, where HMRC issue an assessment in circumstances in which (inter alia) a loss of tax has been brought about carelessly or deliberately by the person, then any "relief or allowance" shall be given effect if the person so requires as follows:

> **"Section 36 — Loss of tax brought about carelessly or deliberately etc**
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–
> (a) brought about deliberately by the person,
> (b) attributable to a failure by the person to comply with an obligation under section 7,
> …
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).
> (1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.
> …
> (3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.
> (3A) In subsection (3) above, "claim or application" does not include an election under any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief).
> …"

331. Section 36 does not apply to the remittance basis because it does not confer a relief or allowance. The claim is not for a relief or allowance, it is for an alternative basis of charge. This is made clear by s809A ITA 2007 which provides:

> "**Section 809A – Overview of Chapter**

This Chapter provides for an alternative basis of charge in the case of individuals who are not domiciled in the United Kingdom."

332. In addition, s809B(3) applies s 42 and s 43 TMA 1970, which provide the procedure for claims to relief, to claims for the remittance basis precisely because a claim to be taxed on the remittance basis is not a claim for relief as follows:

"**Section 809B – Claim for remittance basis to apply**

…

(3) Sections 42 and 43 of TMA 1970 (procedure and time limit for making claims), except section 42(1A) of that Act, apply in relation to a claim under this section as they apply in relation to a claim for relief."

333. Sections 42 and 43 TMA 1970 provide:

"**Section 42 — Procedure for making claims etc**.
(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
…
**Section 43 — Time limit for making claims**
(1) Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates.
…"

334. Section 43A TMA 1970 applies where an assessment has been made and the loss of tax was not brought about carelessly or deliberately by that person, and enables a "claim, election, application or notice" which could have been made or given to be made within one year from the end of the year of assessment in which the assessment is made as follows:

"**Section 43A — Further assessments: claims etc**
(1) This section applies where—
(a) by virtue of section 29 of this Act an assessment to income tax or capital gains tax is made on any person for a year of assessment, and
(b) the assessment is not made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by that person or by someone acting on behalf of that person.
(2) Without prejudice to section 43(2) above but subject to section 43B below, where this section applies—
(a) any relevant claim, election, application or notice which could have been made or given within the time allowed by the Taxes Acts may be made or given at any time within one year from the end of the year of assessment in which the assessment is made, and
(b) any relevant claim, election, application or notice previously made or given may at any such time be revoked or varied—
(i) in the same manner as it was made or given, and

(ii) by or with the consent of the same person or persons who made, gave or consented to it (or, in the case of any such person who has died, by or with the consent of his personal representatives),
except where by virtue of any enactment it is irrevocable.
(2A) In subsection (2) above, "claim, election, application or notice" does not include an election under—
(a) any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief),
(aa) section 55C of ITA 2007 (election to transfer allowance to spouse or civil partner),
(c) section 35(5) of the Taxation of Chargeable Gains Act 1992 (election for assets to be re-based to 1982).
(2B) For the purposes of this section and section 43B below, a claim under Schedule 1AB is relevant in relation to an assessment for a year of assessment if it relates to that year of assessment.
(3) For the purposes of this section and section 43B below, any other claim, election, application or notice is relevant in relation to an assessment for a year of assessment if—
(a) it relates to that year of assessment or is made or given by reference to an event occurring in that year of assessment, and
(b) it or, as the case may be, its revocation or variation has or could have the effect of reducing any of the liabilities mentioned in subsection (4) below.
(4) The liabilities referred to in subsection (3) above are—
(a) the increased liability to tax resulting from the assessment,
(b) any other liability to tax of the person concerned for—
(i) the year of assessment to which the assessment relates, or
(ii) any year of assessment which follows that year of assessment and ends not later than one year after the end of the year of assessment in which the assessment is made.
(5) Where a claim, election, application or notice is made, given, revoked or varied by virtue of subsection (2) above, all such adjustments shall be made, whether by way of discharge or repayment of tax or the making of assessments or otherwise, as are required to take account of the effect of the taking of that action on any person's liability to tax for any year of assessment.
(6) The provisions of this Act relating to appeals against decisions on claims shall apply with any necessary modifications to a decision on the revocation or variation of a claim by virtue of subsection (2) above."

335. We are satisfied that this section cannot apply because the Respondent's conduct was at least careless.

336. However, even if s 43A could apply, the Respondent has already been the subject of assessments for the years 2013-14 – 2015-16 on 22 March 2019 and 13 March 2020. Accordingly, the time limit for making a claim under s43A expired (for the most recent assessments) on 6 April 2021 and therefore the Respondent will not be able to rely on that provision.

337. Overall, the Respondent did not make claims to be taxed on the remittance basis for 2013-14 – 2015-16 and cannot rely on sections 36 and 43A TMA 1970 to make consequential claims. He is therefore subject to UK income tax on his worldwide income for those years.

*Have (or will) remittances occurred of the income arising in 2016-17?*

338. In relation to 2016-17, HMRC accept that they presently are unable to identify whether or not remittances have occurred, but the reason for this is that the Respondent has failed to comply with the Information Notice, in particular providing the trust accounts.

339. It would be entirely consistent with the operation of the offshore structure for funds to have been remitted to the UK (in particular since a number of the offshore entities did not have bank accounts), and Officer Jackson refers to evidence that £900,000 of the taxable income paid to Normandy Group Ltd was lent to Chartwell Care Holdings Ltd and Frisco Capital Ltd did purchase UK properties in May 2016, 2017 and 2020. We are therefore of the view that on the balance of probabilities remittances did occur.

340. In addition, UK source income, in particular the rental income received in relation to UK properties and the interest receivable from Chartwell Asset Management Limited (a UK company) remains subject to income tax even if it were not remitted.

Capital Gains Tax (section 87 TCGA 1992)

*Bounty*

341. The Respondent has not disputed that a capital gain has arisen and that, in principle, it would be chargeable on him if matched under section 87A TCGA 1992. However, he rightly states that a tax liability only arises to the extent that the gains can be matched to distributions. He also submits that there is no element of bounty but, for the reasons we have set out above in relation to the settlements legislation, this is incorrect.

*Matching distributions from the Trust to gains*

342. We accept that it is presently unknown whether or not there are distributions to which the gains can be matched. Given the wide definition of distributions, careful consideration of the trust accounts and the Respondent's transactions with the offshore entities would be required: this is information that has been requested under the Information Notice but which has not been provided. HMRC have also noted that gains that cannot presently be matched to distributions might be matched in future years.

*Have any of the distributions been remitted?*

343. In addition, the Respondent submits that the gains would be regarded as foreign gains. However, since the gain arose in the year 2013-14, being a year in which the Respondent did not make a claim to be taxed on the remittance basis, he would be chargeable on his worldwide gains.

*Conclusion on legal challenges on liability to Income Tax and CGT*

344. We are satisfied that it was reasonable for Officer Jackson to believe that as a matter of law there was an amount of income tax and CGT due from the Respondent which had not been paid or would not be likely to be paid. We are satisfied of the same on the balance of probabilities. We have formed the same view as the Officer as to the figures for the tax at risk without making precise findings on the balance of probabilities.

*Causal link between the failure to comply and the tax at risk*

345. The Respondent disputes that there is a sufficient connection between the failure to comply with the Information Notice and the (potential) underpayment of tax. As we have said, the opinion of the HMRC officer (Mr Jackson), at the time of the application, is merely required to be rational in this respect (*Tager* at [87]). Henderson LJ in *Tager* referred to a "causal link" between the failure to comply and the loss of tax (at [8] and [86]). Evidently, if an information notice related to entirely separate tax liabilities from those that comprise the tax at risk, then this condition would not be satisfied.

346. The Tribunal asked whether the causal link required in Paragraph 50(1)(c) refers only to tax unlikely to be assessed or tax unlikely to be paid even where assessed. We agree with HMRC's argument and we are satisfied that, if a tax liability had been established (for example, an assessment had not been appealed or had been upheld on appeal), and the only issue was payment (i.e. the taxpayer cannot/will not pay), then it is very difficult to see how the causal connection between the information sought and the tax liability could be satisfied, given that it was already established.

347. Nonetheless, as Mr Elliott submitted, there are certain circumstances in which matters of liability are determined in payment/enforcement proceedings (see, for example, *Hoey v HMRC* [2021] UKUT 0082 (TCC) in relation to PAYE credits), in which case the taxpayer would have an argument that he was not required to "pay". Indeed, taxes such as PAYE and inheritance tax are not "assessed" as such and therefore, if liability is disputed, it may be more accurate to state that the tax is unlikely to be "paid" rather than assessed.

348. As Mr Elliott submitted, the fact that HMRC believe that they may be able to assess some of the tax to best judgement (as they did in making the discovery assessments for the relevant tax years in 2019 and 2020 and subsequently to the paragraph 50 application in making the discovery assessment of March 2021) does not undermine the satisfaction of the condition in Paragraph 50(1)(c). We reject Mr Firth's argument that the raising of the assessments prevents Paragraph 50 from having any application.

349. If a situation arose in which HMRC had all the information that could be relevant to the liabilities in question, then there would be no proper need for the information and the connection would not be satisfied, but in other circumstances, as Mr Elliott submitted, HMRC are entitled to information that will assist them establishing whether (or not) there is additional tax at risk, and which might assist them in meeting any

arguments that the taxpayer might raise in disputing those liabilities, as well as in quantifying the sums at stake. It is a fundamental principle that HMRC assess and collect the right amount of tax, no more and no less. Compliance with an information notice assists in that exercise and the fact that in the absence of compliance HMRC choose to make discovery assessments to protect their position makes no difference.

350. We therefore reject Mr Firth's argument that HMRC cannot pursue a Paragraph 50 Penalty where they have subsequently made assessments or closure notices in respect of the same or similar sums of tax said to be due. There is nothing in the legislation that prevents this and the rationale behind Paragraph 50 is not to collect the tax but to impose a penalty for failure to comply with Information Notice. As Henderson LJ said at [90] of *Tager*, the penalty is not intended to be a proxy for recovery of the unpaid tax. Conversely, if the ability to assess undermined HMRC's ability to obtain further information then this would constitute a significant gap in HMRC's enforcement powers as taxpayer non-compliance would be permitted once HMRC had sufficient evidence to found an assessment.

351. It is also worth noting that although the protective assessments issued by HMRC are similar in amount to the amount calculated by Officer Jackson as being the "tax at risk", there are sums included in respect of liabilities which are not linked to the Information Notice. We see nothing in the legislation which suggests that in a situation where there is an application for a Paragraph 50 Penalty and discovery assessments are issued in parallel, that there should be a forensic exercise so as to distinguish the amounts including the assessments which also make up the "tax at risk" from other potential tax liabilities. These are two entirely separate legislative regimes.

352. HMRC's information powers may be their only opportunity to obtain the evidence that they require in order to meet an appeal and there is no reason why Parliament would have enabled a taxpayer to avoid compliance merely because HMRC have some of the information that they believe they require. If an officer rationally believes that the information sought will assist HMRC's investigation (and potentially assist in future proceedings), then the condition in Paragraph 50(1)(c) is met.

*Conclusion on Paragraph 50(1)(c)*

353. For all the reasons set out above, HMRC have satisfied us that Paragraph 50(1)(c) is fulfilled. At the time he made the Paragraph 50 Application, and at the time of the hearing, Officer Jackson held a rational belief that, due to the Respondent's failure to comply with the Information Notice, £1,917,578 income tax and capital gains tax was at risk (had not been paid or was unlikely to be paid).

354. His belief that tax was due as a matter of fact and law was reasonable.

355. We have formed the same view as to the amount of tax at risk on the evidence and legal submissions before us for the purposes of Paragraph 50(3).

**The fourth statutory condition for the imposition of a penalty – Paragraph 50(1)(d) - before the end of the period of 12 months beginning with the relevant date, an officer of Revenue and Customs makes an application to the Upper Tribunal for an additional penalty to be imposed on the person**

356. HMRC applied for the paragraph 50 penalty on 8 October 2020, having issued a paragraph 39 penalty on 24 October 2019. HMRC have satisfied Paragraph 50(1)(d) which requires the application to have been made within twelve months of the relevant date as defined in Paragraph 50(7), which provides as follows:

> "(7) In sub-paragraph (1)(d) "the relevant date" means—
>
> (a) in a case involving an information notice against which a person may appeal, the latest of—
>
> (i) the date on which the person became liable to the penalty under paragraph 39,
>
> (ii) the end of the period in which notice of an appeal against the information notice could have been given, and
>
> (iii) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn, and
>
> (b) in any other case, the date on which the person became liable to the penalty under paragraph 39."

357. Whichever date is the latest for the purposes of Paragraph 50(7)(a) depends on our interpretation of events. We have found that the date the Respondent became liable to a penalty under paragraph 39 was on 14 February 2020 for the purposes of Paragraph 50(7)(a)(i). That was the date on which the paragraph 39 penalty was confirmed rather than the date on which it was issued (24 October 2019). That was on the basis that we have found that there is no outstanding appeal against that penalty. The application under Paragraph 50 was made on 8 October 2020 so was well within the twelve-month time period, even if time runs from the issue of the paragraph 39 penalty.

**Fifth statutory condition for the imposition of a penalty – paragraph 50(1)(e) -the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed;**

**and**

**Paragraph 50(3) - in deciding the amount of the penalty, the Upper Tribunal must have regard to the amount of tax which has not been, or is not likely to be, paid by the person.**

***The Law***

358. We start with some observations as to the background against which the power in Paragraph 50 operates.

359. The ability of HMRC to obtain full and accurate information in relation to a person's tax position is fundamental to the operation of the UK tax system. As was said in *Tager* at [1], if a tax system is to operate fairly and efficiently, it is essential that taxpayers should provide prompt, full and accurate answers to legitimate requests for relevant information made by the tax authorities. If HMRC cannot obtain the information that is relevant to verifying a taxpayer's liability then the system effectively ceases to function because there is no way of ensuring that the correct amount of tax is paid. As was said in *Tager* at [64] (citing the decision of the Upper Tribunal with approval):

> "The unnecessary diversion of HMRC's resources by an uncooperative taxpayer over a prolonged period such as has occurred in this case is wholly unacceptable. If all taxpayers behaved as Mr Tager has done the administration of tax would become impossible."

360. It should also be borne in mind that HMRC's tax assessing powers are time-sensitive (since assessments can generally only be made within four years) six years if carelessness is demonstrated and twenty years if (inter alia) deliberate conduct is demonstrated. However, the burden of providing such conduct is borne by HMRC and the discharge of that burden of proof requires evidence.

361. It is for this reason that Parliament has granted HMRC not only extensive powers to obtain information and documentation, but also the power to issue or apply for penalties in order to ensure prompt compliance under Sch 36. HMRC's initial powers to impose penalties (in paragraphs 39 and 40) are limited, albeit there is also a power under paragraph 49A for HMRC to apply to the FTT for daily penalties of up to £1,000 a day.

362. In this context, Parliament has created a unique jurisdiction of the Upper Tribunal to impose an unlimited tax-related penalty in cases of serious non-compliance.

363. In *Tager* Henderson LJ made a number of general observations regarding the exercise of the power to impose tax-related penalties as follows:

> (1) The fact that the power to impose a penalty was conferred exclusively on the Upper Tribunal was alone a clear indication that the power was intended by Parliament to be reserved for serious cases, which would need to receive a high level of judicial scrutiny: [8].
>
> (2) The provision is a penal one, and it must be taken to be reserved for serious cases of non-compliance with information notices, typically where imposition of an initial fixed penalty of £300 and continuing daily penalties at the relatively modest rate of up to £60 per day have failed to secure compliance. Whilst it is not necessarily a last resort, it would be hard to envisage circumstances where it would be appropriate for HMRC to make an application under paragraph 50 until fixed and daily penalties have been imposed for a significant period to no avail: [86].
>
> (3) In deciding whether a penalty should be imposed the Upper Tribunal should have regard to the usual considerations which apply when the imposition of a tax

penalty is in question, including such matters as the reasons for non-compliance, the extent to which the position has been remedied, the gravity and duration of the non-compliance, the presence of aggravating or mitigating factors, the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis), and generally the need to achieve a fair and proportionate outcome, having regard to the interests of the public purse and the general body of taxpayers as well as the circumstances of the non-compliant taxpayer himself: [88].

(4) In determining the amount of the penalty, the obligation on the Upper Tribunal is only to "have regard to" the amount of tax shown to be at risk as a result of the failure to comply with the notice. The penalty is not intended to be a proxy for recovery of the unpaid tax, and Parliament has deliberately decided against providing for a fixed or mechanical relationship between the amount of the tax unpaid and the amount of the penalty. Indeed, a regime of tax-geared penalties would often make little sense, and could give rise to insuperable practical difficulties, in a situation where HMRC are by definition still trying to obtain the necessary information about the taxpayer's tax position: [90].

(5) The “tax at risk” figure should be discounted by a substantial proportion before being used as a yardstick for the imposition of a tax-related penalty in cases where information available to HMRC is very limited: [98].

(6) Although there will be many cases where it is an acceptable approach to fix the amount of a penalty under paragraph 50 by applying a percentage to the “tax at risk” it is not always necessary to show a demonstrable link between the tax unpaid and the penalty imposed. It is enough if the amount of the tax unpaid, taken in conjunction with all the other relevant circumstances, informs the determination of quantum and yields a result which is proportionate to the scale and nature of the taxpayer's default: [108].

364. Accordingly, we shall approach the question as to whether it is appropriate to impose a penalty and, if so, the amount of that penalty, by reference to these observations and principles.

***Discussion and Decision***

365. Mr Firth submitted that, if, contrary to his submissions, the statutory conditions for the imposition of a penalty were satisfied, it was not appropriate to impose a penalty because:

(1) The Respondent believed that the Trustee would provide the information sought and the Trustee has provided information in response to requests from the local tax authority (as required by local law).

(2) The Respondent sought to establish a reasonable excuse defence to the paragraph 39 penalty but was wrongly denied a hearing due to alleged technicalities.

(3) Paragraph 50 is reserved for the most serious cases of non-compliance, as the Court of Appeal said in *Tager*. However, in the present case, that the fixed

and daily penalties have not had an opportunity to work in the intended way (which, crucially, includes the right of appeal) and so the relevant level of seriousness of non-compliance has not been reached. It is also notable that the Respondent was relying upon his professional adviser in this respect.

(4) Many of the documents have been provided, some through the correct channels of HMRC seeking assistance from overseas authorities.

(5) HMRC say this case is serious is because the Respondent is deliberately seeking to keep information hidden. However, that is not consistent with the facts. For instance, as already noted, the Respondent agreed the third-party notice to his solicitors which yielded significant amounts of information that HMRC rely on.

(6) Even on HMRC's best case, there are considerable uncertainties and large elements of speculation in asserting that tax is at stake.

366. If, contrary to those submissions, the Upper Tribunal was of the view that a penalty was appropriate Mr Firth submitted that the penalty is not a proxy for collecting the tax alleged to be at risk. Overall, the penalty needs to be proportionate. Where the tax at risk is ultimately very low, this may mean a multiple of the tax. Where the tax at risk is said to be very high, a sufficient disincentive to non-compliance may be achieved by imposing a penalty of something considerably less than the highest amount of tax said to be at risk.

*The Tribunal's determination*

367. We have decided that it is appropriate to impose a penalty under paragraph 50 in a substantial amount. We regard this as a serious case of non-compliance for the following reasons.

368. First, it is clear that the Respondent has been uncooperative in responding to the request for information. On the basis of our findings, he clearly had the ability to seek information from the Trustee and decided not to do so. He has failed to comply with the Information Notice. We make no findings as to whether his behaviour amounts to wilful refusal but, even so that would not excuse his behaviour. The Respondent's own evidence is that he delegated his obligations to his accountant rather than taking any steps to obtain the information himself. In his witness statement the Respondent stated that he instructed Leigh Carr to obtain the information and "expected" them to engage with the Trustee of the Taj Trust. He does not state that he has personally made any efforts at all to obtain the information sought by HMRC or even that he believed he had done all that could reasonably be done to comply. We are satisfied that the Respondent knew that it was his personal obligation to comply with the Information Notice and has avoided doing so. For the reasons set out at [103]-[137], we were satisfied that there was a consistent, repeated and prolonged failure of the Respondent to meet his personal obligations under the Information Notice to provide documents and information which were within his possession or power to obtain.

369. The Respondent's failure to comply with the Information Notice has clearly caused an unnecessary diversion of HMRC's resources in attempting to gather the information from other sources over a significant period of time. Further resources have

been expended on the making of discovery assessments in order to protect HMRC's position.

370. When it became apparent to the Respondent that the Trustee was not providing the information requested the Respondent, he could and should have stepped in to ensure that the information was provided by the Trustee, a power which as we have found, he clearly had as the sole beneficiary of the Taj Trust.

371. It is now almost two years since the Information Notice was issued. The penalties issued under paragraphs 39 and 40 of Sch 36 (the daily penalties are £5,280 and £4,200), have had no effect on the Respondent's behaviour. Neither has the fact that HMRC have applied for a penalty under paragraph 50 changed the Respondent's behaviour. It is still the case that no substantive attempt has been made to comply with the Information Notice – the threat of a penalty at large has still not encouraged compliance.

372. Second, the only reason given for non-compliance is that the Respondent does not have any documents and HMRC should contact Mr Carter – not only is this an unjustified attempt to avoid or abrogate the Respondent's personal duties (as the taxpayer) to provide this information himself but:

(1) Notwithstanding the Respondent's encouragement to contact Mr Carter, the latter has not responded to HMRC's requests for information.

(2) It is evidently not correct that the Respondent does not have at least some of the documents and information sought by HMRC in his possession or power – see our findings above, in particular in relation to (i) transactions between himself and the Trustee, (ii) correspondence, (iii) the Trust Deed, (iv) the fact that the trustee was willing to provide (selective) information to assist the Respondent for the purposes of the present proceedings.

373. Third, the suggestion, that the Respondent believes that he has a reasonable excuse for failure to comply with the Information Notice is untenable. We reject the submission that the Respondent has been wrongly denied a hearing on his appeal in relation to the Paragraph 39 Penalty. As we have found, the Respondent has made no effort to pursue his appeal notwithstanding that he and his advisers has been aware for over a year that the appeal was rejected. They only have themselves to blame for the fact that the appeal could not be heard.

374. Fourth, whilst it is acknowledged that the Respondent has cooperated to some extent in the investigation by consenting to third party notices, this partial compliance does not compensate for the complete failure to comply (and complete failure to attempt to comply) with the Information Notice in the present case, which seeks to obtain information in relation to considerable assets held beneficially by the Respondent outside of the UK.

375. As Mr Elliott submitted, attempts to obtain the relevant information from other sources have been successful to some extent, since some documentation (such as the Trust Deed) has been obtained. However, attempts to obtain key documents such as the

trust accounts (rather than the ledgers) have been unsuccessful. In particular, HMRC have (on the Respondent's repeated request) contacted Mr Carter in relation to the information sought, but he has not provided any information. Moreover, when HMRC sought to obtain the information via a request to the Swiss Federal Tax Administration they were informed that Landmark does not act as the trustee of the Taj Trust.

376. Nor does this partial compliance compensate for obstructive conduct. An example of such obstructive conduct is the very basic question of whether or not the Respondent was a beneficiary of the Taj Trust – a question to which the Respondent evidently knew the answer and a fact that Mr Sanfilippo accepted Mr De Souza also would have known. It has only been in the witness statements recently submitted for the present proceedings that it has been accepted that the Respondent is the beneficiary of the Taj Trust.

377. Fifth, the overall amount of tax at stake is evidently significant, as is the value held in the offshore structure. Officer Jackson' evidence was that the UK property portfolio alone is worth over £4m and the annual turnover of the Chartwell Group is over £2m. In addition, Mr Jackson refers to other historic liabilities that might be due above those identified by him for the purposes of the present application. The fact is that HMRC cannot know what transactions have occurred until the Respondent has complied with the Information Notice. In addition, HMRC have identified other potential errors in the Respondent's return (which are not related to the information requested in the Information Notice), some of which have been the subject of the protective assessments.

378. There are also concerns about other tax liabilities relating to the offshore structure owned by the Respondent – for example, it remains unclear why Holdenby and Berkeley did not file non-resident landlord returns when they were in receipt of rent from UK properties (it was only once the properties were transferred to Frisco Capital Ltd that non-resident landlord returns began to be submitted).

379. Taking into account the public interest, the fair and proportionate outcome in this case is to impose a penalty reflecting the Respondent's serious failure to comply with the Information Notice, at a figure that is sufficient to penalise the Respondent's past conduct, incentivise future compliance, and deter future non-compliance (by the Respondent and other taxpayers).

380. We now turn to the amount of the penalty.

381. When considering the quantum of the penalty we must have regard to the amount of tax which has not been, or is not likely to be, paid by the person **(**the tax at risk) for the purposes of Paragraph 50(3).

382. We have not decided the tax at risk issue conclusively because it might encroach on the role of the FTT which might in the future be called upon to resolve the same issue in the course of appeals against assessments or closure notices. As we have said, our decision made in proceedings under Paragraph 50 (in particular when applying Paragraph 50(3)) should not affect future appeals to the FTT against (e.g.) discovery assessments.

383. In relation to quantifying the tax at risk for the purposes of Paragraph 50(3), we accept the submissions that part of the identified liabilities are uncertain, in particular due to the application of the remittance basis in 2016-17 and the absence of evidence of distributions. We should therefore apply a discount to those aspects of the liabilities when having regard to the amount of any penalty. However, we have also noted that the only reason that HMRC cannot be certain of those liabilities is because of the Respondent's failure to comply with the Information Notice – which, as HMRC submit, is a factor weighing in favour of a higher penalty.

384. As Henderson LJ observed in *Tager* at [90], as summarised at [362] above, in determining the amount of any penalty the Tribunal must have regard to (but is certainly not constrained by) the amount of tax which has not been, or is not likely to be, paid by the Respondent. Where, as in this case, amount of tax at risk is a large sum, that will be a strong factor in favour of imposing a large penalty, but that does not mean, as Henderson LJ said, that there should be a mechanical relationship between the amount of the tax paid on the amount of the penalty. Whilst the penalty imposed must act so as to provide credible deterrence, it must also be fair and proportionate.

385. We therefore reject Mr Elliott's submission that the penalty should be in the full amount of the tax at risk, namely £1,917,578.

386. We apply a substantial discount of 50% to the tax at risk figure because the tax liability remains uncertain. This is for all the reasons we have indicated above.

387. We take into account the following points in mitigation:

(1) HMRC do not allege any dishonesty on the part of the Respondent;

(2) The Respondent's conduct could be categorised as a failure to comply with the Information Notice rather than outright obstruction;

(3) There was some partial assistance given to HMRC in that the Respondent consented to the third-party information notice which was issued to his solicitors and others; this was a partially positive attempt to attempt to help HMRC to obtain access to evidence to access (albeit he might have known that HMRC may still have been able to obtain approval from the FTT for the third-party information notice in the absence of his consent);

(4) The paragraph 40 penalties are under appeal and there was an initial attempt to appeal the paragraph 39 penalty. Therefore, the Respondent cannot be said to have washed his hands of the process and the penalties have not been completely ignored;

(5) While the obligation to comply with the Information Notice is personal to the Respondent, it is accepted (although not always reasonably) that he has relied on professional advisers throughout. He has, although very belatedly and only in response to the hearing of the application, made contact with relevant foreign contacts who might provide relevant evidence to HMRC, although too late for that material to be admitted in evidence. While the reliability of the information

now provided has not been established, the Respondent has provided a limited form of engagement with HMRC;

(6) The Respondent has very belatedly engaged with the Paragraph 50 Application, in the circumstances which allowed him to be reinstated and take part in proceedings and provide answers to HMRC's allegations (even if the Tribunal has not accepted all his explanations);

(7) There has been contact with the Trustee and advisers regarding the Trust on several occasions albeit that HMRC was compelled to go through the formal mutual legal assistance channels with the Nevis authorities to obtain further information;

(8) In HMRC's correspondence with the Respondent's accountants and representatives, while they did not always assist, there were some minor elements of compliance which were evidently on the Respondent's instructions. There was no evidence he encouraged trustees to provide information but once the Trustee and Mr Carter responded the Respondent passed this on to HMRC; and

(9) The Respondent did not demonstrate some of the aggravating factors that were identified in *Tager* such as not complying with undertakings.

388. Nevertheless, this was a serious case of non-compliance with a large sum of tax at risk, the use of offshore structures, and concerted conduct by the Respondent to avoid his responsibilities for complying with the Information Notice. However, the threat of this application has not so far provided sufficient deterrent to have led to any serious change of attitude on the Respondent's part.

389. In fixing the amount of the penalty we have had regard to the aggravating and mitigating factors and applied a 50% reduction to the tax at risk. We have had regard to the fact that the amount of the penalty should be proportionate to the tax at risk but not a proxy for the tax. We have taken into account of the public interest and objectives to ensure compliance with Information Notices, deterrence and punishment, but that the amount should be no more than necessary to achieve these objectives and should be fair and proportionate.

390. Having taken into account all of those factors, we are satisfied that the appropriate amount of the penalty should be £350,000.

**Disposition**

391. HMRC's application is granted and we order that the Respondent pay a penalty under Paragraph 50 in the sum of £350,000.

Signed on Original

**JUDGE TIMOTHY HERRINGTON JUDGE RUPERT JONES**

**UPPER TRIBUNAL JUDGES**

**RELEASE DATE: 4 October 2021**

## Appendix

### The Reinstatement Application and the Postponement Application

***Case history and procedural background***

1. On 8 October 2020 HMRC filed an application with the Upper Tribunal seeking a tax-related penalty under paragraph 50 of Schedule 36 FA 2008. The application was served on the Respondent's representatives, Leigh Carr, and clearly stated that it was an application to the Upper Tribunal under Paragraph 50.

2. On 12 November 2020, the Upper Tribunal issued directions requiring (inter alia) that (a) HMRC file a statement of case and list of documents, (b) the taxpayer file a statement of case and list of documents, (c) the parties file witness evidence and (d) the application be listed for hearing. In the reasons given by Judge Herrington, the Respondent was reminded of "his obligations […] to help the Upper Tribunal to further the overriding objective of dealing with cases fairly and justly".

3. On 13 November 2020, Leigh Carr Chartered Accountants acknowledged the Upper Tribunal's email and indicated that they "will be dealing with the matter in due course".

4. On 14 December 2020, in accordance with the directions, HMRC filed and served a statement of case and list of documents and served copies of the listed documents. HMRC's statement of case made it clear that a penalty was being sought on the basis that the total tax considered to be at risk was £1,916,315.

5. On 18 December 2020 Leigh Carr wrote to the Upper Tribunal requesting that his appeal be withdrawn.

6. Later on 18 December 2020 the Upper Tribunal responded with Judge Herrington's observations on the withdrawal application. These observations were made because it was clear to the Judge that Leigh Carr had misunderstood the nature of HMRC's application and that the proceedings were entirely separate from any other proceedings may have taken place in the FTT. The Tribunal said:

> "1. The Respondent asked that "this appeal be withdrawn and be heard at the First-Tier Tribunal." It therefore appears that the Respondent disputes the jurisdiction of the Upper Tribunal in relation to HMRC's application. However, the Respondent appears to admit in its letter that a penalty has already been imposed under paragraph 39 of Schedule 36 to the Finance Act 2008 which is not the subject of an outstanding appeal to the First-tier Tribunal. Accordingly the Upper Tribunal appears to have jurisdiction to hear the application made under Paragraph 50 of Schedule 36 to the Finance Act 2008. The First-Tier

> Tribunal therefore does not have any further jurisdiction in relation to this matter.
>
> 2. The Respondent will be aware that HMRC have already filed their Statement of Case in compliance with the Upper Tribunal's directions of 12 November 2020. It is not clear whether the Respondent intends his representative's letter to be a Reply to that Statement of Case, which has been directed to be made by Direction 2 Upper Tribunal's directions of 12 November 2020. The Respondent is reminded of the terms of that direction which requires the Respondent to:
> (a) serve on the Applicants and file with the Tribunal a Reply to the Statement of Case setting out his reasons why the tax-related penalty should not be imposed and identifying all matters contained in the Statement of Case which are disputed by the Respondent together with the Respondent's reasons for disputing them;
> (b) serve on the Applicants and file with the Tribunal a list of documents on which the Respondent will seek to rely; and
> (c) serve on the Applicants copies of all documents so listed.
>
> 3. It is clear to the Judge that the Respondent's letter does not comply with the terms of this direction. Accordingly, the Respondent is reminded that there is still time to file a Reply to the Statement of Case in compliance with this direction, the relevant deadline being 13 January 2020. Insofar as the Respondent has observations in response to the Judge's observation at paragraph 1 above, that is a matter which can be dealt with in the Respondent's Reply.
>
> 4. The Respondent's representative indicates that The Respondent is unable to afford the cost of pursuing these proceedings. The Judge observed that it may be open to the Respondent to apply for legal aid, bearing in mind the seriousness of the potential penalty involved. If, however, it is not the intention of the Respondent to participate in the proceedings, he should notify the Upper Tribunal of that fact as soon as practicable and the matter will proceed accordingly."

7. Later on 18 December 2020 Leigh Carr emailed the Upper Tribunal and HMRC stating: "We can confirm that The Respondent is unable to incur further costs in regard to this matter and would like to withdraw from these proceedings."

8. On 21 December 2020, HMRC emailed the Upper Tribunal and Leigh Carr as follows:

> "The Applicant (HMRC) notes the Respondent's below request to withdraw from these proceedings. HMRC further notes that the Respondent's notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal (per rule 17(2)). HMRC does not object to the Respondent's request that he does not participate any further in the proceedings.
> In the context of an application for a tax-related penalty under paragraph 50 of Schedule 36 to Finance Act 2008, HMRC's understanding is that the Respondent's withdrawal from the proceedings would not conclude the application, as an application under paragraph 50 requires an exercise of

> discretion by the Upper Tribunal and it is the Upper Tribunal that decides if it is appropriate to impose the penalty and that decides its amount (in contrast to an appeal against a penalty that has already been issued).
> Accordingly, even if the Respondent does not wish to participate in the proceedings (and the Upper Tribunal consents to his withdrawal), it appears to HMRC that the application must continue to a determination, either on paper or at a hearing (and the Respondent will remain a party to the proceedings even if he has indicated that he does not wish to participate). Given that the matter is relatively complex, HMRC submits that it is more appropriate for the matter to be dealt with at a hearing.
> On this basis, if the Upper Tribunal consents to the Respondent's withdrawal, HMRC proposes that: (i) HMRC files its witness evidence (in compliance with paragraph 3 of the Directions dated 12 November 2020) not later than 42 days after HMRC receives written notification of the Upper Tribunal's consent to the Respondent's withdrawal under rule 17(5); and then (ii) HMRC files its listing information for the hearing (in compliance with paragraph 7 of the Directions dated 12 November 2020) not later than 14 days after HMRC files its above witness evidence. Notwithstanding that the Respondent wishes to withdraw from the proceedings, HMRC propose to continue to serve all documents relating to the proceedings on the Respondent."

9. On 21 December 2020 Leigh Carr emailed the Tribunal and HMRC as follows:

> "Thank you for your email. The content of which we have kindly noted.
> We have to reiterate that The Respondent cannot pay any professional advisers nor can afford our own fees.
> We attach The Respondent's payslips for the last 3 months and you will see that he does not have the funds to proceed with this Tribunal. As stated in our letter of the 15 December, due to the current pandemic, the finances of the Chartwell Group have been severely impacted.
> We enclose a letter from Landmark SA which again reiterates what we have said in our previous correspondence. The Respondent has made all reasonable efforts within his control and has been fully co-operative in his efforts to obtain information that HMRC have requested."

10. On 4 January 2021 the Upper Tribunal emailed the parties with Directions from Judge Herrington, which included that "Consent is given to the withdrawal of the Respondent's case in these proceedings".

11. On 15 February 2021, HMRC filed with the Tribunal, and served on Leigh Carr, the witness statement of Officer Jordan Jackson. HMRC also provided the Tribunal and Leigh Carr Chartered Accountants with a Dropbox link containing the exhibit bundle to said witness statement. In paragraph 175 of his witness statement, Mr Jackson states that HMRC seek a penalty of 100% of the tax at risk, being £1,916,315.

12. On 18 February 2021, HMRC filed with the Tribunal, and served on Leigh Carr, HMRC's listing information statement, which stated "HMRC's anticipated duration of the hearing is 2 days for the hearing and 1 day for reading time" and that "The Respondent has withdrawn from the proceedings, so we do not expect the Respondent to take any part in the hearing".

13. On 20 February 2021 'Brian White Limited' (nondomicile@hotmail.co.uk) emailed HMRC, the Tribunal and Leigh Carr as follows:

> "HMRC has written to a deliberately misleading email to the UT and sort to avoid the underlying required principles of fairness and justice.
> At the time of withdrawing from the Tribunal it was understood that the only outstanding issue was the small penalty of circa £10k. On a cost/benefit basis, there was little merit in contesting that at the UT and that was the sole basis for the withdrawal.
> Out of the blue, and as an example of sharp practice, HMRC in the form of Jordan Jackson issued a 60+page witness statement asserting wildly that there was tax and income and gains totalling some £1.9m (which we believed were which have yet to be assessed, nor gone through rebuttal, Independent Review nor ADR .
> HMRC are inappropriately using the withdrawal of the penalty (which we believed was the only outstanding issue) to suggest that the appeal against the matters raised in this new witness statement are equally to be left unchallenged . That is sharp practice.
> When we tried to raise this with Jamie Popat at Solicitors office he refused to talk to us and engage professionally with us to ascertain how this imbroglio had arisen. We expect professional standards from a lawyer at Solicitors Office of HMRC, and the normal route would be for these amounts to be assessed and appealed against and not, as in this case, use the withdrawal of the penalty to misdirect the taxpayer.
> The taxpayer will be forwarding to HMRC a full rebuttal of the asserted income and gains in the witness statement, and when HMRC do assess, he will file a formal appeal and postponement then. But this withdrawal of appeal should not be taken to be anything other than the withdrawal of the appeal against the penalty".

14. Also on 20 February 2021 Leigh Carr Chartered Accountants responded to the UT, Brian White Ltd and HMRC as follows:

> "Noted.
> Good letter.
> Carl will take your input when he formalizes the letter to the UP."

15. It is clear from Brian White Limited's letter that they had also misunderstood the nature of the Paragraph 50 proceedings and that they had not appreciated that they were entirely separate from the previous proceedings in the FTT or any further proceedings that may result from any assessments to tax at HMRC may make. Neither had Brian White sought to be recognised as the Respondent's representative in the proceedings alongside or instead of Leigh Carr.

16. Later on 22 February 2021 (11:55), the Upper Tribunal emailed HMRC, Leigh Carr and 'Brian White Limited' as follows:

> "Any submissions from HMRC should be made within the next 14 days.

> Mr White- If you wish the below email to be treated as an application to reinstate their case under Rule 17 of the Tribunal's Procedure Rules in which case they are directed to provide within the next 14 days (i) their authority to act on behalf of the respondent pursuant to Rule 11 of the Procedure Rules (ii) reasons why the application is being out of time (bearing in mind the time limit for reinstatement provided for in Rule 17(4)) and (iii) a full explanation as to the facts and matters that led them to believe that the Appellant was only being pursued for a penalty of £10,000."

17. Later on 22 February 2021 'Brian White Limited' (nondomicile@hotmail.co.uk) twice emailed the Tribunal, HMRC and Leigh Carr Chartered Accountants:

Email at 13:30:

> "We attach the application to the UT re the tax related penalty we received. That is why we believed it only related to the penalty.
> The recent witness statement suggests tax of £1.9m; which is contested and based on incorrect assertions and incomplete information.
> As such the appellant does not contest the penalty (purely on a cost benefit basis) but contests very loudly the tax asserted by the witness statement.
> Therefore there is NO NEED for any hearing if the Tribunal is confirmed to the penalty matter as that is agreed by the taxpayer as the cost of two days representation is more than the penalty.
> The purpose of this note is to ensure the UT is confining itself solely to the penalty matter.
> Copied to the taxpayers agents with whom we gave been engaged by and to confirm their authority to act on behalf of the respondent pursuant to Rule 11 of the Tribunal Procedure Rules (ii) the reasons why the application is being out of time (bearing in mind the time limit for reinstatement provided for in Rule 17(4)) is due to the extension by HMRC of the penalty matter to tax which has yet to be even assessed.
> Finally the full explanation as to the facts and matters that led the Applicant to believe that the Appellant was only being pursued for the penalty is set out in the attached document issued by HMRC".

Email at 13:39:

> "If the UT is being asked to impose a penalty of circa £9.8k on the Respondent under paragraph 50 Schedule 36 FA 2008 then this is agreed; as long as that is the remit of the question being asked of the UT".

18. Once again, these emails demonstrate Brian White Limited's continued failure to understand the nature of the Paragraph 50 proceedings.

19. Later on 22 February 2021, HMRC emailed the Upper Tribunal, copied to Leigh Carr Chartered Accountants and 'Brian White Limited' as follows:

> "In response to the Upper Tribunal's below email of today (at 11:55), we note that the Respondent (The Respondent) has not made an application and has withdrawn from the proceedings. If the Respondent makes any

application to reinstate his case then HMRC will of course be happy to make submissions on such an application in due course.
However, HMRC respond to the emails dated Saturday 20 February 2021 (at 19:42 and 22:34) and the emails of today (at 13:30 and 13:39) to provide clarification for the benefit of the Upper Tribunal:

1.HMRC are not aware of Brian White Tax Resolution Ltd being appointed as The Respondent's representative or agent in relation to the present proceedings or his tax affairs generally. The Respondent's appointed representatives in the present proceedings are Leigh Carr (Chartered Accountants). HMRC are therefore in a difficult position as they have no authority to communicate with Brian White Tax Resolution Ltd in respect of The Respondent's confidential tax affairs or in relation to these proceedings.

2. The Respondent is referred to the email from the Upper Tribunal to the parties' representatives (in particular, Leigh Carr) dated 18 December 2020 (at 14:50) setting out Judge Herrington's comments and confirming that the subject matter of the proceedings has always been an application for a penalty under paragraph 50 of Schedule 36 to Finance Act 2008. The Respondent is also referred to HMRC's Statement of Case filed and served on 14 December 2020 setting out the nature of the proceedings and the relevant factual background. It was following the clarification from Judge Herrington and the receipt of the Statement of Case that Leigh Carr confirmed on 18 December 2020 (at 16:34) to the Upper Tribunal that the Respondent would like to withdraw from the proceedings.
For the avoidance of doubt, HMRC have separately issued daily penalties under paragraph 40 of Schedule 36 to Finance Act 2008 to the Respondent for non-compliance with the information notice (please see paragraphs 17 to 22 of HMRC's Statement of Case dated 14 December 2020 and paragraphs 19 to 25 of HMRC's Application dated 07 October 2020). These are the subject of appeal before the First-tier Tribunal (reference TC/2020/03619) and are not the subject of the present proceedings.

3. Any suggestions of HMRC misleading the Upper Tribunal or 'sharp practice' are groundless. The nature of the present proceedings has always been clear. Moreover, HMRC cannot engage with Brian White Tax Resolution Ltd unless and until they are provided with authority to do so by The Respondent."

20. On 23 February 2021, the Upper Tribunal responded to the parties with observations from Judge Herrington:

"The recent correspondence on this matter has been passed to Judge Herrington who makes the following observations:

"None of the correspondence from Brian White Tax Resolution Ltd appears to make a formal application for the reinstatement of the Respondent's case pursuant to Rule 17 (4) of The Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, the Upper Tribunal has no jurisdiction at the current time to deal with any representations from the Respondent on the substance of the proceedings.

> Furthermore, in the absence of any authority directly from the Respondent himself as required by Rule 11 (2) of The Tribunal Procedure (Upper Tribunal) Rules 2008 the Tribunal is not in a position to correspond with Brian White Tax Resolution Ltd."

21. Later on 23 February 2021, Brian White Tax Resolution Ltd emailed the Tribunal, HMRC and Leigh Carr:

> "The sole issue before the UT is whether the penalty is the only issue. if so the taxpayer agrees to pay it and there is no need for a hearing."

22. On 24 February 2021 (14:27), the Tribunal emailed the parties with observations from Judge Herrington:

> "Although not specifically addressed to the Tribunal, the Tribunal is prepared to accept the authority addressed to HMRC as authority to deal with Brian White Limited.
>
> In the proceedings before the Upper Tribunal the only issue before the Tribunal is whether to impose on The Respondent a tax geared penalty pursuant to paragraph 50 of Schedule 36 to Finance Act 2008. These proceedings are quite separate to the penalty proceedings previously instituted in the First -tier Tribunal and whatever penalty may have been imposing those proceedings is not relevant to the proceedings in the Upper Tribunal. Therefore, until HMRC's application to the Upper Tribunal has been determined, the amount of any penalty that the taxpayer may have to pay pursuant to the proceedings under paragraph 50 of Schedule 36 to the Finance Act 2008 cannot be calculated. Therefore, if The Respondent wishes now to challenge any imposition of a tax geared penalty under paragraph 50 of Schedule 36 to the Finance Act 2008 he must apply for the reinstatement of his case and in the absence of any such application the proceedings will continue on their current course without the participation of The Respondent."

23. There was no further correspondence from the taxpayer or either of his representatives between 23 February 2021 and 23 May 2021.

24. On 23 May 2021, Brian White Ltd sent a letter of authority to the Tribunal.

25. On 24 May 2021 (17:26) Leigh Carr emailed the Tribunal, HMRC and 'Brian White Limited' as follows:

> "Further to Mr Brian White's email of 22 February we confirm that our client has accepted the penalty of circa £10K and withdrawn his appeal to the Tribunal.
>
> We have also appealed against the assessments issued by Mr Jackson on 3 March 2021 of £1,129,010.68. This assessment was issued after Mr Jackson purported in his witness statement that there was tax owing of some £1.9M.

> We reiterate what was stated by Mr Brian White's email of 23 February in that there is no need for a hearing as this will incur additional costs to our client and the tax owing as stated by Mr Jackson has no real foundation and is purely speculative. Particularly, when in Mr Jackson's letter of 25 February 2021, he states that 'HMRC consider it probable that capital payments would have been matched in 2014/15 (thus creating a charge under s87 TCGA 1992)'. There have been no such capital payments made to The Respondent!
> Can you confirm that whether Tribunal hearing of the 28 June is still going ahead in regard to the tax geared penalty under para 50 Sch 36 FA 2008."

26. This email demonstrates Leigh Carr's misunderstanding of the proceedings despite Judge Herrington's and HMRC's explanations.

27. On 25 May 2021 the Upper Tribunal emailed HMRC, Leigh Carr Chartered Accountants and 'Brian White Limited' asking HMRC to confirm whether or not they are proceeding with their application for the tax-related penalty.

28. Later on 25 May 2021 (15:45), HMRC emailed the Upper Tribunal, copied to Leigh Carr Chartered Accountants and 'Brian White Limited':

> "We write further to the Upper Tribunal's below email of today's date (at 14:33). We confirm that HMRC maintain their application to the Upper Tribunal dated 07 October 2020 for a tax-related penalty under paragraph 50 of Schedule 36 to Finance Act 2008.
> In respect of the below email dated 24 May 2021 (at 17:26) from Leigh Carr Chartered Accountants to the Upper Tribunal, we refer to our email dated 22 February 2021 (at 16:37) and, particularly, reiterate two points:
> 1. The Respondent has withdrawn from these Upper Tribunal proceedings and has not made any application to reinstate; and
> 2. HMRC have separately issued daily penalties under paragraph 40 of Schedule 36 to Finance Act 2008 to The Respondent for non-compliance with the information notice (please see paragraphs 17 to 22 of HMRC's Statement of Case dated 14 December 2020 and paragraphs 19 to 25 of HMRC's Application dated 07 October 2020). These are the subject of appeal before the First-tier Tribunal (reference TC/2020/03619) and are not the subject of these Upper Tribunal proceedings. The proceedings in the First-tier Tribunal are separate to these proceedings in the Upper Tribunal."

29. On 25 May 2021 'Brian White Limited' in another message demonstrating their failure to understand the nature of the proceedings emailed the Upper Tribunal, HMRC and Leigh Carr Chartered Accountants as follows:

> "The client accepted the penalty of 10k and therefore withdrew from the Appeal to Tribunal. so HMRC make no sense by asserting it should continue
> As HMRC state the daily penalties are under appeal to FTT and not Tribunal.
> So what is the Tribunal being asked to look at ??"

30. Later on 25 May 2021 the Upper Tribunal emailed the parties reminding them of what Judge Herrington had said about the nature of the proceedings in February 2021.The email concluded:

> "HMRC have now confirmed that they wish to continue with their application to the Upper Tribunal pursuant to paragraph 50 of Schedule 36 to the Finance Act 2008, notwithstanding the making of the assessment earlier this year and which it appears is the subject of a separate appeal to the First-tier Tribunal and the payment of the penalty previously imposed by HMRC and which was the subject of separate proceedings in the First-tier Tribunal.
> Accordingly the hearing listed to commence on 28 June 2021 will proceed as scheduled. As The Respondent did not apply for the reinstatement of his case the hearing will proceed without the participation of The Respondent."

31. On 25 May 2021 (17:44), 'Brian White Limited' (nondomicile@hotmail.co.uk) emailed the Tribunal, HMRC and Leigh Carr Chartered Accountants as follows:

> "The Respondent had not appreciated (nor had his advisers) that HMRC were issuing a penalty enforceable by the Tribunal linked to an estimated assessment until now. HMRC have assessed £1.9m which is disputed on the basis HMRC have incorrectly understood much of the information and all information has been provided to HMRC to show that the tax claimed is simply not payable. In addition, the Trustees had to comply with their legal processes before the information could be provided to HMRC. Therefore for this case to proceed without The Respondent's representative being able to make submissions would not be in the interests of justice or fairness, which are the overriding principles of the Tribunal
> We therefore ask for the this to be reinstated and The Respondent to be legally represented.
> In 37 years we have never seen such a penalty linked to an estimated assessment, which has yet to be proven".

32. On 26 May 2021, Brian White Tax Resolution Ltd emailed the Tribunal, HMRC and Leigh Carr as follows:

> "Counsel has now been appointed, Michael Firth of Grays Inn Tax chambers to attend the hearing and make submissions.The taxpayer nor his advisers understood what HMRC was trying to do; it is important to note from the evidence that HMRC were apprised as to why there were delays as the Trustees had to take their own legal advice per Swiss Law before they could release information to the taxpayer. That evidence, that HMRC has received confirms that there is no tax liability.
> For the record, HMRC have received all the information requested"

33. It appears that after taking advice, the Respondent's advisers had finally appreciated the nature of the proceedings and their seriousness. In addition to their application for reinstatement, the Respondent sent an email on 26 May 2021 stating:

> "The summary from HMRC today clearly demonstrates that that the taxpayer and his advisers were all erroneously under the impression that the only penalty in issue was circa £10k and had not understood that a separate claim by HMRC for the large tax geared penalty based on asserted and unproven liabilities was actually being sought by HMRC; a penalty which is very rare indeed. Indeed

> the only case on this since the law many years was introduced, is Tager (2018), and the Court recognised how onerous on HMRC this was.
>
> Therefore witness statements which will
> 1) Deal with the withdrawal and reasons for it, and,
> 2) Dealing with the underlying penalty issue - i.e. what was done in response to the information notice and why and what the underlying tax position appeared to be at the time.
> are all being drawn up for submission within 7 days to the TRIBUNAL".

34. By its Directions dated 27 May 2020, the Tribunal granted the application for reinstatement subject to the condition that the Respondent:

> (1) Within 7 days provided confirmation provided by him directly to the Tribunal that henceforth Brian White Limited are to act as the Respondent's sole representative in these proceedings; and
>
> (2) not less than 7 days before the hearing, filing with the Tribunal, and serving on the Applicants, a skeleton argument in accordance with the Directions of the Tribunal released on 12 November 2020.

35. In breach of those Directions, the Respondent did not confirm who his representatives were. Indeed, both Brian White Limited and Leigh Carr Chartered Accountants have been in contact with the Tribunal and HMRC on behalf of the Respondent in relation to these proceedings since those Directions were issued. On 4 June 2021 (at 17:21), the Respondent filed two witness statements, from Mr Onofrio Sanfilippo and Mr Sukhdev Mattu. Contrary to the email of 26 May 2021, this was not undertaken within 7 days (which would have been by 2 June 2021).

36. In their letter dated 11 June 2021, HMRC:

> (1) Noted their concern that any late evidence should not lead to the adjournment of the hearing listed for 28 and 29 June 2021;
>
> (2) Set out a proposed timetable for the hearing, including time for cross-examination of the Respondent's two witnesses;
>
> (3) Stated their position that, provided that "the above timetable can be agreed, then HMRC do not object to the Respondents' witness evidence being admitted".

37. The Respondent did confirm that the two witnesses were available for cross-examination (but made no further representations).

38. On 14 June 2021, HMRC filed their skeleton argument addressing the witness evidence of Mr Sanfilippo and the Respondent.

39. On 17 June 2021, the Upper Tribunal granted permission for the Respondent to rely on the two witness statements, noting in particular that the timetable proposed by HMRC in their letter of 11 June 2021 had not been objected to by the Respondent and was approved. In addition, witnesses would be required to attend the hearing to be cross-examined. The Tribunal said:

> "Judge Herrington has considered HMRC's letter of 11 June 2021 regarding the late admission of the witness statements filed on behalf of the Respondent and HMRC's proposed timetable for the hearing.
> The Judge notes that the Respondent has had the opportunity of commenting on HMRC's proposals. The Respondent's representative has responded with an observation as regards HMRC's prior notice in their letter that they will be putting an allegation of dishonesty against The Respondent (which the Judge observes is set out in HMRC's skeleton argument). Neither the Respondent nor his representatives have made any observations on the timetable so the Judge is proceeding on the basis that they have no objections to it.
> Accordingly, the Judge approves the timetable proposed by HMRC in their letter of 11 June and admits the Respondents' witness evidence accordingly.
> The Judge has also directed that the hearing shall proceed as a hybrid hearing and accordingly both parties' witnesses will be required to present in person at court for the purposes of giving their evidence and being cross-examined."

40. On 21 June 2021 (at 17:51), the Respondent filed his skeleton argument. This was one hour later than the deadline directed by the Tribunal in its Directions dated 27 May 2021 (and therefore strictly the Respondent failed to comply with either of the conditions imposed by the Tribunal for reinstatement).

41. On 21 June 2021, without any prior notice, the Respondent filed a further witness statement of the same date, from a new witness (together with exhibits), Mr Ian Ledger, an employee of the company that acted as a trustee of the Taj Trust. Mr Ledger was said to be of Landmark Management S.A.M. and based in Nevis in the Caribbean. That witness statement suggested the Respondent was not the economic settlor of the Taj Trust but rather it was another person, Mr Sukhdev Singh Bassi. Mr Ledger suggested that the Trustee of the Taj Trust was Landmark Fiduciary Company Limited, a Nevis company, not Landmark Management Switzerland S.A.

42. The Respondent did not make an application to introduce this late evidence but it was understood that the Respondent sought to have the witness's evidence given by video link.

43. Given the procedural history, the proximity to the hearing, and the risk that the further witness evidence poses to the hearing being completed within its allotted time, HMRC objected to the admission of the witness evidence of Mr Ledger.

44. Mr Firth, Counsel for the Respondent, filed a skeleton argument dated 23 June 2021 in support of the submission that the Upper Tribunal should admit Mr Ledger's evidence in deciding HMRC application for a paragraph 50 penalty.

45. In a decision dated 24 June 2021 Judge Herrington refused to admit the evidence of Mr Ledger. His essential reasons were as follows: "

> " 1. The length of the delay is clearly not short. I exercised my discretion to admit two very late witness statements earlier this month in circumstances where I would have been fully entitled not to do so since, as HMRC observed, the time for filing witness evidence in these proceedings had long since passed. Were it not for HMRC not objecting to the admission of that evidence, on the basis that the timetable for the hearing was not to be compromised, I would have refused the application. Therefore, on the basis that in effect I gave permission for witness evidence to be filed by early June 2021, the attempt now to file further evidence must be regarded as being out of time by a significant period of time.
>
> 2. No good reason has been given for the delay in providing this evidence. It is evidently evidence that has been available right from the outset of these proceedings and could certainly have been filed alongside the other witness statements earlier this month. I do not accept that it was only necessary to file the evidence at this stage because of the allegations of dishonesty. The evidence concerned is relevant to the question of who is the economic settlor of the trust, which is a matter that needs to be considered in these proceedings and should have been made available at an earlier stage, well before the allegations of dishonesty appeared in HMRC's skeleton argument, in order to assist the Tribunal in resolving this issue. There is therefore no good reason for the delay.
>
> 3. As regards the question of prejudice, I accept that the evidence is relevant to the issue of dishonesty and that is a significant factor in deciding whether it should be admitted, even at this late stage in the proceedings. However, The Respondent is to be cross-examined so the Tribunal will have the opportunity of assessing his credibility without the late evidence.
>
> 4. There will clearly be prejudice to HMRC if this evidence is admitted late. What has been done effectively amounts to an ambush which is not fair in the context of proceedings of this kind and is inconsistent with the efficient conduct of litigation. HMRC will be deprived of the opportunity of considering the evidence in detail, and providing any evidence in response. It is pure speculation on Mr Firth's part that they will not be able to file any further evidence, were they be given reasonable time to respond, which is no longer possible.
>
> 5. As far as other factors are concerned, I accept that steps could be taken to ensure that the current timetable is not imperilled, on the basis of what Mr Firth said about his offer to reduce his cross examination of HMRC's witness. However, it is said that Mr Ledger can only give evidence by video link. Although this has not been investigated, it is not clear whether it will be feasible to set this up in the short time available between now and the hearing. No indication is given as to where Mr Ledger is situated. In any event, had this witness evidence been made earlier, he could have attended in person alongside the other witnesses and therefore I attach no weight to the fact that the evidence would need to be given by video link.

> 6. I must place strong weight on the poor behaviour of the Respondent and his representatives (from whom I exclude Mr Firth in this respect) in complying with the previous directions of the Tribunal. They seem to believe that compliance with directions is optional and they can proceed as suits them, as demonstrated by the latest attempt to introduce new witness statement without any prior notification to the Tribunal or taking the trouble to perform the simple courtesy of making an application in advance. This is unacceptable. Furthermore, as things stand, the Respondent technically has no right to participate in the proceedings next week. The reinstatement was conditional upon the position as to the Respondent's representatives being clarified and the filing of a skeleton argument, which, as HMRC observed, was slightly late. The Respondent will have to explain the reasons for these latest examples of non-compliance at the outset of the hearing next week, and the Tribunal will have to be satisfied with those explanations before the Respondent will be permitted to participate in the proceedings.
>
> 7. Finally, the authorities demonstrate that I must give strong weight to the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected. As demonstrated by their actions, neither the Respondent nor their representatives appear to have any respect for time limits. Their failure to comply with directions and the making of late applications will undoubtedly increase the cost of these proceedings and have imperilled the efficient conduct of these proceedings.
>
> 8. Weighing up all of these factors leads me to conclude that the application should be refused. Mr Firth's one good point was the point he made about the allegations of dishonesty. However, the balance of prejudice is clearly against the Respondent having taken into account of the unfairness to HMRC which will be caused by the admission of this new evidence at this very late stage. As I have found, the delay in filing the evidence in this case is not a short one and no good reason has been given for the delay. This has all happened against a background of serious non-compliance with directions in the past. Furthermore, I must give strong weight to the need for the efficient conduct of these proceedings.
>
> 9. In those circumstances, applying the overriding objective to enable the Tribunal to deal with this case fairly and justly means that I must refuse to admit the witness statement of Mr Ledger and he will not be permitted to give evidence at the hearing.'

46. At the outset of the substantive hearing, since the Respondent had not complied with the two conditions for the reinstatement of his case, Mr Firth made a further application for the case to be reinstated.

47. At the same time, Mr Firth applied for the proceedings to be postponed on the grounds that the Respondent was, for health reasons, now unable to attend the hearing and give evidence. Evidence of the Respondent's condition was provided as follows.

48. The Respondent had stated that he had detected blood in his stools, sent photos to his GP and had been advised to take himself to A & E. The Respondent had admitted himself to a private London hospital where he had been seen by a doctor, Professor

Patel. He had been told they needed to explore the possibility of him suffering from colon cancer – and the hospital would want to perform a colonoscopy but apparently that could not be undergone until the Respondent had first been treated for a clot in his leg, which was likely to take place in 4 days.

49. The written evidence we received concerning the Respondent's health consisted of a hospital admission / registration form and an email from his GP to Professor Patel dated 27 June 2021 at 13.13 BST. The admission form stated that the Respondent had been admitted at 6.31pm on 27 June 2021 with an expected length of stay being 4 nights. It stated that he had been referred by Professor Patel and listed his GP's details. The email from the Respondent's GP, Dr Gupta, to Professor Patel stated that the Respondent presented with a 2-3 months history of fresh rectal bleeding and abdominal cramps. He had a history of gastric bypass in the past on two occasions. The cause of the rectal bleed was unknown and it was not known whether the case was inflammatory bowel disease or diverticulitis. They needed to exclude other underlying causes such as colorectal cancer, due to the Respondent's substantial weight loss in the last few days.

50. Mr Firth therefore applied for a partial postponement of the hearing in order for the Respondent to give evidence on the issues to which his evidence was directly relevant, not least the allegation of dishonesty that HMRC was pursuing. He accepted that the hearing could proceed in part to hear argument and evidence on the more technical or legal issues such as whether paragraph 50(1)(a) of Sch 36 FA 2008 was satisfied and whether there was a live appeal before the FTT in relation to the paragraph 39 penalty. Mr Firth also accepted that HMRC's case, its evidence in support of the substantive application and Mr Sanfilippo's evidence regarding historical and procedural issues could be heard in addition. Thereafter he proposed postponing for a further hearing at which the Respondent would be fit to give evidence.

51. Mr Firth submitted that basic fairness required the case to go part-heard. He relied on the Court of Appeal's observations in *Teinaz v Wandsworth London Borough Council* [2002] EWCA Civ 1040 at [20]-[22] which emphasised:

> "21. A litigant whose presence is need for the fair trial of a case, but who is unable to present through no fault of his own, will usually have to be an adjournment, however inconvenient it may be to the Tribunal or court and to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But the Tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine , and the onus is on the applicant for an adjournment to prove the need for such an adjournment.
>
> 22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the Tribunal or court has doubts as to whether the evidence is genuine or sufficient, the Tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved……'

52. Mr Firth invited a postponement by which time they could obtain a prognosis from Dr Patel regarding the Respondent's health for the re-listing of the case. He

submitted that this was a very serious case, particularly where HMRC sought a tax-related penalty in the sum of around £2 million and it was fundamental to the fairness of proceedings that that the Respondent's evidence was heard. Based on his instructions and given the Respondent's medical condition, the Respondent was not in a fit state to give evidence through video technology from the hospital, despite this opportunity being offered to him.

53. Mr Elliott, Counsel for HMRC opposed any postponement of the hearing but submitted it could proceed on all issues to the full extent possible. He accepted that HMRC would withdraw all dishonesty allegations if the hearing was to proceed but if it were postponed then they would be maintained.

54. In opposing the postponement Mr Eliott pointed out the Respondent's poor conduct throughout the proceedings (relying on the history set out above), the lack of detailed evidence in the Respondent's witness statement, the fact that the questions to be decided were primarily ones of law or to be decided on contemporaneous documentary evidence and that the Tribunal would not be making any final binding determination as to the tax at risk.

55. Mr Elliott questioned the quality medical evidence provided and submitted that the Respondent would still receive a fair hearing even if he did not give oral evidence. He relied upon the judgment of Adam Johnson QC (as he then was) in *Financial Conduct Authority v Avacade Limited and others [2020]* EWHC 26 (Ch) ('*Avacade*') at [59]-[70], in particular the following principles distilled from previous authorities:

> "59.A good starting point is Levy v Ellis-Carr [2012] EWHC 63 (Ch) in which Norris J gave the following guidance on the proper approach to the assessment of the medical evidence relied on in support of an adjournment application:
>
> > "Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion and what arrangements might be made (short of an adjournment) to accommodate the party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case). The letter on which the Appellant relies is wholly inadequate."
>
> 60. The guidance given by Norris J has been approved in a number of later decisions, including by Lewison LJ in the Forresters Ketley v Brent [2012] EWCA Civ 324 at [26], and again by the Court of Appeal in GMC v Hayat [2018] EWCA Civ 2796 at [48].
>
> 61. In the Forresters Ketley case, Lewison LJ also said the following at [25] which is relevant in the circumstances of this case:

> "Judges are often faced with late applications for adjournments by litigants in person on medical grounds. An adjournment is not simply there for the asking. While the court must recognise that litigants in person are not as used to the stresses of appearing in court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing."

62. GMC v Hayat mentioned above also provides support for the proposition that, in considering the weight to be attached to a particular medical report, the court is entitled, indeed obliged, to look at it in light of the history and the other materials available to it. In that case, Lang J had allowed an appeal from a decision of the Medical Practitioners Tribunal on the basis that the Tribunal had failed to adjourn proceedings against the appellant in light of a sick note he produced which advised that he was not fit for work.

63. Lang J's decision was overturned by the Court of Appeal. Coulson LJ at [45] said that Lang J appeared to conclude that, because the sick note post-dated earlier evidence of the appellant's condition, "it somehow trumped all that had gone before it". Coulson LJ said that was wrong in principle.

64. At [56] he then said:

> "Finally, I consider that the Tribunal was entitled to weigh up the (inadequate) sick note against all of the other material available to them. This included not only the existing medical evidence (and the fact that the sick note was broadly consistent with that other evidence, and not contrary to it) but also the fact that [the appellant] had already made three unsuccessful applications to adjourn this hearing on entirely different grounds, each without success."'

***Decisions on the two applications***

56. Judge Herrington gave an oral decision on the first morning of the hearing reflecting our decisions to allow the reinstatement application but refuse any postponement of the hearing. These are our fuller reasons.

57. We decided that while the two applications for postponement and reinstatement were separate, they were also connected.

*Reinstatement*

58. In relation to the reinstatement application, we considered the nature of the Respondent's repeated breaches of directions and the circumstances before and after his withdrawal from proceedings.

59. We decided it was in accordance with the overriding objective, just and fair, to permit the Respondent to participate in proceedings, through his counsel and the

admission of his written evidence. We therefore granted his reinstatement application pursuant to Rule 17(3) and our case management powers under Rule 5(3) to extend the time for complying with any rule. This was notwithstanding the fact that the Respondent was in breach of the two conditions stipulated in Judge Herrington's directions of 27 May 2021.

60. We decided that the overall fairness and justice required the Respondent being permitted to participate in proceedings on the basis that the hearing proceeded as scheduled. In coming to that conclusion we considered matters as a whole taking into account all the circumstances of the case. In particular we took into account the Respondent's continuing non-compliance by failing to identify his representative and filing a skeleton argument an hour late and even today he was not prepared to do what was directed in latest set of directions dated 21 June 2021 – explaining the non-compliance with the directions of 27 May 2021.

61. We accepted that the late service of the skeleton argument was a relatively trivial breach of the directions but it had to be viewed in light of the breach of numerous other conditions, as is explained above.

62. We also accepted that the nature of the penalty sought against the Respondent was serious and the amount sought large, even if HMRC were prepared to forego the dishonesty allegations, and that he should have the opportunity to present his case. We accepted that there would be real prejudice were he and his representatives not permitted to take part in proceedings and the application were heard and determined based only upon HMRC's evidence and submissions.

63. We were prepared to give the Respondent a reasonable opportunity to give oral evidence and accommodate him remotely or in person at any point throughout the two-day hearing. We did not know the extent to which he was able to give evidence on either day of hearing but did not consider the absence of his oral evidence would outweigh other factors in proceeding. We took into account that the conduct of Respondent and his representatives and was unsatisfactory and a number of questions remained unanswered. While there were serious breaches of directions these were outweighed by the fact that it was a serious and important case and the Respondent should be given an opportunity to participate through written and oral submissions of his Counsel and the written statements of the Respondent and Mr Sanfilippo which had been served on 4 June 2021 and admitted.

*Postponement*

64. In relation to the postponement application, we applied the overriding objective under Rule 2 to deal with cases fairly and justly which included not causing unnecessary delay.

65. We accepted that the Respondent had been admitted to hospital on a precautionary basis but we were not supplied with any independent medical evidence that he was unfit to give evidence on either day of the hearing, in person or by video.

We only had his instructions through Counsel. We took into account the principles outline in the *Avacade* judgment.

66. The height of the independent medical evidence was the two written documents. It appeared that the Respondent had been suffering from a longstanding medical condition but the timing of his admission to hospital (on the afternoon before the first day of the hearing) was said to be as a result of a need to investigate the cause of blood in his stools. We were not given any evidence as to a confirmed diagnosis or any type of prognosis – only the evidence of his self-stated symptoms and the fact of his admission.

67. Therefore, we were not satisfied that the independent medical evidence was such that it confirmed the Respondent was unfit or unable to give oral evidence on either day of the hearing whether in person or by video. On that basis alone we were not satisfied that the Respondent was in fact unable to give oral evidence if he had chosen to.

68. We repeated the offer that the hearing could proceed and if the Respondent chose or was available, we would fit his evidence around the rest of proceedings on either day in order for it to be received in any manner convenient, in person or remotely. We were prepared to sit late or accommodate him in any other way.

69. When considering the fairness and justice of such approach, we took into account HMRC's concession that if the hearing proceeded it would no longer be pursuing allegations of dishonesty in the absence of the Respondent giving oral evidence. Further the Respondent's evidence in the form of his written statement would be admitted and considered, albeit less weight would be given to it if he was not cross examined upon it.

70. As will be apparent from our decision on the Paragraph 50 Application, the issues in dispute in the application were primarily ones of law rather than ones of fact. There were very few factual issues in dispute: primarily whether the Applicant had complied or sought to comply with the Information Notice (whether documents were in his power or possession) and whether he was the economic settlor of the Taj Trust (which affected whether some of the tax alleged was at risk). He had given written short evidence denying each in his witness statement, however this was not supported by much in the way of reasoning. These issues also turned on further questions of law and were not simply factual. In the case of the Information Notice there was jurisdictional debate as to the extent of the Respondent's power or control over documents – he had suggested he could not obtain documents but had done what he could transfer to the request to those who could provide them; in the case of the Taj Trust he had also admitted he had made loans which might be sufficient to satisfy the relevant legislation.

71. While it may have been preferable to hear from the Respondent, we considered it is unlikely his evidence would have added much to his two-page witness statement. The nature of HMRC's case in relation to the substantive application focussed upon the potential tax at risk. This primarily relied on contemporaneous independent documentary evidence, contained in a documents bundle running to over 1,000 pages, which would be considered in detail.

72. While the nature of the penalty pursued by HMRC was serious, we also took into account the fact that we would not be making any final determination of the Respondent's tax liability.

73. We also took into account the need not to cause unnecessary delay. In the absence of any confirmed diagnosis or prognosis, it was not clear that granting a postponement would ensure the Respondent's attendance on any other occasion and when a part-heard hearing might be resumed. However, we repeated our offer that it was still open for the Respondent to give oral evidence by whatever means and we were prepared to accommodate him online or in person at any point in the proceedings.

74. We therefore refused the postponement application and the hearing proceeded. In the event, the Respondent did not give any oral evidence in support of his case.