



TC04988

Appeal number: TC/2015/04907

*capital gains tax – late return - penalty for late payment – delay by HMRC -
reasonable excuse – special circumstances - appeal refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ESTATE OF MR W SYLVANUS-JONES

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE IAN HYDE
IAN PERRY**

Sitting in public in Birmingham on 11 November 2015

The appellants did not attend and were not represented at the hearing

Nicola Stove, officer of HMRC, for the Respondents

DECISION

1. This appeal concerns penalties in respect of the late payment of capital gains tax on the disposal of a house by the appellants. There is no dispute as to the time for payment or the calculation of the penalty but the appellants argue that the circumstances and in particular the delay and mistakes made by HMRC provide the appellants with a reasonable excuse or special circumstances to justify there being no penalty or at least a reduced penalty.

2. The appellants did not attend and were not represented at the hearing but, having made written representations through their advisers, the appellants consented to the hearing proceeding in their absence.

Facts

3. There was no disagreement between the parties as to the facts of this appeal.

4. Mr William Sylvanus-Jones died on 28 August 2008 and the executors of his estate were Emma Sylvanus-Jones and Charles Sylvanus-Jones. Following his death costs were incurred by the estate on the house in resolving subsidence problems and obtaining planning permission on respect of the garden ground adjoining the property. On 29 January 2014 contracts for the sale of the house were exchanged and completion took place on 20 February 2014. In July 2014 Berrys, the accountants acting for the executors and the estate, were first made aware of the sale.

5. 17 October 2014 Berrys wrote to HMRC in Leicester dealing with a number of tax matters concerning the estate including notifying HMRC of the sale of the house in January 2014 and a liability to capital gains tax on the sale in the tax year 2013-14. The letter enclosed a CGT computation for the sale of the house showing a taxable gain of £148,094 and tax due of £41,466.32. The letter highlighted some uncertainty about whether the valuation of the property at the time of death – which would constitute the allowable base cost for CGT purposes – could be based on the valuation of £475,000 obtained for inheritance tax purposes or the higher valuation of £575,000 obtained later in 2014. Berrys suggested using the average of the two valuations and did so in the CGT computation enclosed with the letter. The letter also provided the current addresses of Emma Sylvanus-Jones in London and Charles Sylvanus-Jones in Kibworth Harcourt in Leicestershire. HMRC say that they received the letter on 21 October.

6. On 16 December 2014 HMRC Trusts and Estates Edinburgh wrote to Charles Sylvanus-Jones requiring him to complete a trust and estates self assessment tax return in respect of 2013-14 and notifying him that in order for HMRC to communicate with Berrys they needed the enclosed agent authority form 64-8 to be completed. Whilst the letter did not say so it was not disputed by the appellants that this letter enclosed the relevant tax return. The letter was sent to Mr Sylvanus-Jones' old address in Market Harborough in Leicestershire, notwithstanding Berrys' notification of the new address in Kibworth Harcourt in their letter of 17 October and,

as no evidence was given on the point, it is assumed by the Tribunal that the letter was never received by him.

5 7. HMRC on the same day wrote separately to Berrys asking for an agent authority form 64-8 to be completed but did not enclose the letter to Charles Sylvanus-Jones as they did not have appropriate authority.

8. On 14 January 2015 Berrys spoke to HMRC and discovered the letter of 16 December had been sent to the wrong address and had not been received by Charles Sylvanus-Jones.

10 9. On 15 January Berrys wrote to HMRC requesting the letter be resent to Emma Sylvanus-Jones as the most active executor. Berrys noted that the CGT was due for payment on 31 January and, in bold type, asked that the matter be dealt with urgently in view of the substantial CGT that was due for payment on 31 January.

15 10. On 5 February Berrys called HMRC notifying HMRC that the letter had been sent to the wrong address and requesting that it be reissued. HMRC wrote to Emma Sylvanus-Jones on that day enclosing the letter of 16 December and the enclosures including the tax return for 2013-14.

11. On 24 February the tax return was submitted and received by HMRC on 26 February. The return reported a gain of £148,155, marginally higher than the October 2014 computation.

20 12. On 6 March a payment on account of £40,000 was made with the covering letter quoting the new UTR and was treated as received by HMRC on 7 March.

25 13. On 9 March HMRC wrote requiring a revision to the CGT calculation and notifying the appellant that the correct amount of the gain was £153,605 and the CGT due was £43,101 because the computation had wrongly included an annual CGT exemption for the executors.

14. On 17 March a late payment penalty of £2,155 was raised.

15. On 1 May a further £3,101.40 being the balance of the total £43,101.40 CGT due reflecting HMRC's required amendment, was received by HMRC.

30 16. The appellants appealed to HMRC on 7 April against the late payment penalty and on 2 June requested an internal review under s 49E Taxes Management Act 1970 ("TMA").

35 17. On 17 July 2015 HMRC notified the appellants of the conclusions of the internal review that the original penalty was upheld, that HMRC were not satisfied that there were any reasonable excuse within paragraph 16 schedule 56 TMA ("schedule 56") and no special circumstances within paragraph 9 schedule 56.

18. On 10 August, following further correspondence, the appellants appealed to this Tribunal.

Date for payment

19. Under s 7(1) TMA, every person chargeable to income tax or CGT must give notice that they are so chargeable. By virtue of sub-s 7(1A) and (1C)(a) where the taxpayer has not received a notice to file a return under s 8 TMA then the notification period is 6 months from the end of the year of assessment. It is not disputed here that the effect of s 7(1) is that the appellants had a duty to notify by 5 October 2014.

20. S 59B(3) and (4)TMA provide that;

“(3) In a case where the person-

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment”

21. HMRC accept that they made an error in sending the original letter to the wrong address and so accept that for the purposes of s 59B(3)(b) the notice and tax return should be treated as being issued on 5 February 2015.

22. That being the case had the appellants given notice by 5 October, s 59B(3) would have applied – the condition in s 59B(3)(a) having been met by the appellants and the condition in s 59B(3)(b) having been met by HMRC’s failure to notify - and the obligation to pay would have arisen three months after 5 February 2015, being 5 May. However, as the appellants notified after 5 October, s 59B(4) applies, requiring payment by 31 January 2015.

23. Paragraph 1 of schedule 56 Finance Act 2009 provides a penalty is payable where a person fails to pay an amount of income tax or CGT by;

“The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 10970 as the date by which time the amount must be paid”

24. Paragraph 3 of schedule 56 provides that in respect a payment of tax within, inter alia, paragraph 1, the amount of the penalty is 5% of the amount of the unpaid tax.

25. Schedule 56 allows a 30 day period of grace before a penalty applies, in this case to 2 March. The appellants paid £40,000 of the tax on 6 or 7 March and the balance of £3,101 on 1 May and so, in accordance with the above provisions, a 5% penalty applies in respect of all the tax payable.

26. The argument in this appeal is whether there is a reasonable excuse within paragraph 16 schedule 56 or the penalty should be reduced because there are special circumstances within paragraph 9 schedule 56.

Reasonable excuse and special reduction

5 27. Paragraph 16 schedule 56 provides;

“(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure

10 (2) For the purposes of sub-paragraph (1)-

(a) ...

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

15 (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased”

28. The test as to whether there is a reasonable excuse is an objective one, the excuse must be both objectively reasonable and genuine. The taxpayer should be expected to exercise reasonable foresight and due diligence, or, as summarised by
20 Judge Medd QC in *The Clean Car Co Ltd v C&E Comrs* [1991] VATR 234;

“In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the
25 experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

29. Paragraph 9(1) schedule 56 provides for a special reduction;

“If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule”

30 30. Paragraph 13(1) schedule 56 makes provision for appealing penalties;

“(1) a taxpayer may appeal against a decision of HMRC that a penalty is payable by P

(2) a taxpayer may appeal against a decision of HMRC as to the amount of a penalty payable by P”

35 31. Paragraph 15 schedule 56 provides that;

“(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

(2) on an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may –

(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make

(3) If the tribunal substitutes its decision for HMRC’s, the Tribunal may rely on paragraph 9-

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),or

(b) to a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 9 was flawed

(4) in sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review”

32. It is relevant to note that paragraph 9 permits the Tribunal on an appeal against a penalty to confirm, cancel or vary the penalty provided the variation is only to an amount that HMRC had power to make. Further, the Tribunal’s power to substitute a different decision under paragraph 9 for special circumstances is limited to where, applying judicial review principles, in the Tribunal’s opinion HMRC has acted in a way that no reasonable body of commissioners could have acted or took into account some matter that was irrelevant, disregarded something which they should have taken into account or erred in law.

The parties’ submissions

33. The appellants argue that delay was largely due to HMRC, the need to calculate a complex CGT liability and the administration of the estate with the logistical complexities of the involvement of a number of parties being the two executors, the accountants and solicitors.

34. The appellants acknowledge that the notification of liability should have been made by 5 October. The delay in notifying – which caused the due date for payment to be 31 January 2015 rather than 5 May 2015 - was because of delayed correspondence with the estate solicitors and the executrix. Notwithstanding these factors Berrys notified HMRC on 17 October, only 14 days late.

35. Further, Berrys were only aware of the sale in July 2014. Some of the costs incurred on the subsidence and the planning permission had been paid out of funds held by the executors and some from funds held by the solicitors. Sorting these costs and separating out maintenance costs took time and much correspondence. There was also some uncertainty at the time about the valuation of the property for CGT purposes.

36. The appellants argue that the tax was paid late because they were unable to pay the tax until they had been informed of the unique tax reference number which they did not know until the issue of the tax return on 5 February 2015. The appellants did

not know that they could pay without a UTR or could have used the deceased's lifetime UTR. The appellants had no way of knowing that the UTR was still live as the last return for the deceased had been in 2008-09.

37. Had the appellants received a prompt response from HMRC to Berrys' letter of 17 October then a tax return would have been issued by HMRC much earlier than 5 February 2015 and the tax could have been paid by the due date. In fact the return was submitted on 24 February, the delay between 5 and 24 February being due to needing signatures and so on. Payment of £40,000 was arranged immediately with the estate's solicitors and made on 6 March.

38. When Berrys received HMRC's letter of 9 March requiring a revision to the CGT calculation, considering and obtaining consent to the revision from solicitors and the executors took some time and the balance of the tax due was sent on 28 April. Finally, the funds to pay the tax were held by the estate's solicitors.

39. HMRC dispute that the appellants had a reasonable excuse or that there are any special circumstances. They argue that the appellants could have made payment of the tax significantly earlier. The accountants knew in July 2014 that there had been a sale and in October 2014 sent detailed computations showing a substantial CGT liability. The appellants could have enclosed the payment with the computations. Berrys letter of 15 January said that the matter was urgent as the CGT was due by 31 January. It was not necessary for the taxpayer to have a UTR. They could have used the deceased's lifetime UTR and sorted it out later, paid on account or bought a certificate of tax deposit. As Mrs Stove put it, HMRC would never refuse a payment.

40. Even if the appellants had to wait until receiving the return and the new UTR, they would have had this soon after it was resent on 5 February and, they assumed, no later than 16 February, significantly in advance of the effective due date to avoid penalties of 2 March. The appellants were aware of the need to pay the tax and that it was due by 31 January (Berrys' letter of 15 January). Failure to pay immediately on receipt of the UTR does not demonstrate someone who is taking reasonable care.

Decision

41. The reasonable excuse test within paragraph 16 is an objective one, and in the current circumstances and adapting Judge Medd QC's test, can be summarised as being whether a responsible taxpayer with the experience and attributes of the appellants in the situation that prevailed at the time would have a reasonable excuse for failing to pay the CGT by 31 January 2015.

42. We note that the appellants' account of this matter is seen through the actions of Berrys, the accountants, and all the representations have been made by them. The argument was not put and there no evidence before the Tribunal that there was a reasonable excuse within paragraph 16(2)(b) of schedule 56, that is to say the appellants relied on their advisers and took reasonable care themselves. In any event for the reasons set out below we do not consider the role of advisers to be decisive in this appeal.

43. In considering whether there is a reasonable excuse the Tribunal has had in mind the application of paragraph 16(2)(c) of schedule 56 so that if any reasonable excuse has ceased, for that reasonable excuse to still apply the taxpayer must remedy the failure without unreasonable delay after the excuse ceased.

5 44. We do not accept that the appellants had a reasonable excuse for delaying payment of the tax until after 31 January 2015.

45. The cause of the appellants' difficulties was primarily the failure to notify the liability to tax under s 7(1) by 5 October. There was a period of some 8 months between the sale of the house and 5 October. Even taking the date when the accountants were aware of the sale in July, there were still three months in which to notify the liability to tax. In our view the difficulties in establishing the relevant information and the need to correspond with the estate solicitors and the executrix do not explain this length of delay as notification of liability does not require a precise calculation of the tax due.

15 46. This delay also incidentally accelerated the date for payment. Indeed, because of the operation of s 59B had the appellants notified HMRC by 5 October, HMRC's error in sending the letter of 16 December to the wrong address would have meant that the date for payment to be 31 January 2015 rather than 5 May 2015 and no penalty would have arisen.

20 47. The taxpayer's accountants supplied computations on 17 October 2014 showing CGT due of £41,466.32, an amount very close to the final tax of £43,101, and on 15 January were anxious that the tax should be paid by 31 January. We do not accept that payment of the £41,466.32 that the appellants believed was due in October 2014 or some other amount could not have been made to HMRC without the correct UTR. A prudent taxpayer conscious of his obligation to pay tax on time would have made efforts to pay the tax he believed he owed, if not from 17 October 2014 when Berrys submitted the tax computations at least in good time to meet the 31 January 2015 due date. As demonstrated by their letter of that date, Berrys were aware on 15 January – and presumably before then - that the tax was due for payment on 31 January.

30 48. Further, we note that the tax return and new UTR were sent to the appellants at the correct address on 5 February. We accept there would be logistical difficulties in coordinating with the solicitors, but, being aware of this obligation, a responsible taxpayer would anticipate these difficulties and in our view, had sufficient time to arrange for payment through the new UTR before the penalty became payable on 2
35 March.

49. It is worth noting the position in respect of the additional tax over an above the amount originally calculated by Berrys. In October 2014 the appellants believed £41,466.32 was due but were not aware that the true tax liability was £43,101 until March 2015. No argument was raised by the appellants in respect of the difference
40 which derives from a failure to appreciate that executors are not entitled to an annual exemption for CGT purposes. However, the point of tax law involved is not an

obscure one and we find that a responsible taxpayer would have established the position in good time.

50. As to paragraph 9, under the Tribunal's restricted jurisdiction in respect of paragraph 9, the Tribunal can only substitute its own decision for that of HMRC if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed when considered in the light of the principles applicable in proceedings for judicial review. HMRC did consider in their review whether there were any special circumstances and decided that there were none (their letter of 17 July 2015). We can find no special circumstances on the facts of this appeal to justify a different opinion on the application of paragraph 9 and so, even without the higher judicial review hurdle, would not substitute a different conclusion to that reached by HMRC.

51. For the reasons given above, we dismiss this appeal.

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

IAN HYDE

TRIBUNAL JUDGE
RELEASE DATE: 22 MARCH 2016