[2016] UKFTT 050 (TC)

TC04849

Appeal number: TC/2015/04302

Income tax – discovery assessment – executors having distributed estate – penalty for failure to report taxable income – TMA 1970 s29 – FA 2007 Sch 24 para 11 – appeal allowed as to the penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAHAM USHER & MARTIN PERKINS **Appellants**
executors of Terence Guy deceased

- and -

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

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mrs Caroline de Albuquerque

Sitting in public at Fox Court, Brooke Street, London EC1 on 22 January 2016

The Appellants in person

Mrs Gill Carwardine for the Crown

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DECISION

1 This is an appeal by the executors of the late Terence J Guy against assessment to income tax due from the deceased issued on 15 April 2015 for £14,457.67, and a penalty of £5,060.18 for failure to disclose the income giving rise to the charge.

Facts

2 In addition to the customary documentary evidence, we received the unsworn evidence of the executors. The facts are not in dispute and are as follows.

3 The deceased, Mr Terence Guy, died on 15 October 2012. A return for inheritance tax was filed in January 2013 and probate applied for in February 2013. The estate was worth some £1.5M.

4 On 10 August 2013, the executors filed an annual self-assessment return for 2012/13, which covered the period from 6 April 2012 to the date of death. It underdeclared the income for that period. The executors accepted at the hearing that their conduct had been careless and the Revenue, also at the hearing, accepted that their error had not been deliberate.

5 On 26 September 2013, an executor had written to the Revenue sending a cheque for £15,332.92, which was then the outstanding tax due, and saying:

> I will have to presume this is in full and final settlement, as I am now proceeding to finalise and distribute the estate.

6 The executors proceeded to do that, but they failed to publish notice in the London Gazette of their intention and giving a deadline for any further claims. However, exactly a year later on 26 September 2014 the Revenue wrote raising queries on the accuracy of the return which had been filed for 2012/13; and in due course the assessments referred to at paragraph 1 were issued, there being no dispute about the figures or that the tax in question had in fact been due, and that a mistake had been made in the self-assessment return for that year.

7 The executors felt aggrieved that the Revenue had taken a whole year to raise the query after having been given explicit notice that the estate was to be distributed; a formal complaint was made, which in part was upheld, the Revenue admitting that there had been "poor customer service". The Revenue did not concede however that the tax should be forgiven and they maintained the penalty.

8 The penalty had been assessed on the basis that the executors' conduct had been "deliberate but not concealed". The reasoning in regard to the penalty was that since the inheritance tax return in January 2013 contained the correct figures of the deceased's investment income, the executors "must have known" in August 2013 when they filed the income tax return that the figures in the two returns did not match. The executors had known what they were doing and therefore their action was deliberate.

Legislation

9 Section 29 of the Taxes Management Act 1970 provides:

Assessment where loss of tax is discovered

29(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) .in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

5 (ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two
10 immediately preceding years of assessment;

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade,
15 profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

20 (7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation
25 relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a
30 reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

35 (10) . . .

10 The Finance Act 2007, Schedule 24 provides, as relevant:-

Error in taxpayer's document

1(1) A penalty is payable by a person (P) where -

40 (*a*) P gives HMRC a document of a kind listed in the Table below, and

(*b*) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to -

(*a*) an understatement of a liability to tax,

45 (*b*) a false or inflated statement of a loss, or

(*c*) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable
50 for each inaccuracy.

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is -
(*a*) "careless" if the inaccuracy is due to failure by P to take reasonable care,
(*b*) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
(*c*) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P
(*a*) discovered the inaccuracy at some later time, and
(*b*) did not take reasonable steps to inform HMRC.
4(1) This paragraph sets out the penalty payable under paragraph 1.
(2) If the inaccuracy is in category 0, the penalty is—
(*a*) for careless action, 30% of the potential lost revenue,
(*b*) for deliberate but not concealed action, 70% of the potential lost revenue, and
(*c*) for deliberate and concealed action, 100% of the potential lost revenue.
10(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—
(*a*) in the case of a prompted disclosure, in column 2 of the Table, and
(*b*) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%.][1]

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.
(2) In sub-paragraph (1) "special circumstances" does not include -
(*a*) ability to pay, or

(*b*) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to -
(*a*) staying a penalty, and
(*b*) agreeing a compromise in relation to proceedings for a penalty.
15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.
(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.
(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.
(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.
17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.
(2) On an appeal under paragraph 15(2) the tribunal may—
(*a*) affirm HMRC's decision, or
(*b*) substitute for HMRC's decision another decision that HMRC had power to make.
(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

Submissions

11 For the executors, Mr Usher submitted that the Revenue's delay of one year in responding to his letter of 26 September 2013 was unacceptable and was the proximate cause of the predicament in which the executors now found themselves – having distributed all the estate and having no legal right of reimbursement against the beneficiaries. There might be a possibility of reimbursement from some of the individual beneficiaries, but with regard to the charities who had benefited from 35% of the estate the outlook was bleak: they had been particularly demanding in the distribution and the executors had not so far thought it worth asking them for help.

12 The estate had been considerable and the executors could have had no possible reason to try and evade the comparatively small amount of tax at issue. The error made in the 2012/13 return had been genuine and unintentional, and the correct tax could easily have been paid had the Revenue asked for it in good time. As laymen, the executors did not know, and could not be expected to have known, that an advertisement in the London Gazette of their intention to distribute the estate would have safeguarded their position.

13 Mr Usher and Mr Perkins agreed that the error had been 'careless' in the sense that it could have been avoided with greater diligence, but they said it was certainly not reckless or with intent to cause loss to the Revenue. They accepted that the tax was lawfully due and that interest on it was no more than a commercial restitution to the Exchequer. The penalty was the executors' main concern, and they felt that it was in all the circumstances inequitable that they should have to pay it. Mr Usher claimed that they had sought a meeting with the Revenue but had been denied one, though he could point to no written evidence of that.

14 For the Revenue, Mrs Cawardine accepted that insufficient care had been taken to ascertain all the circumstances before categorising the executors' action as 'deliberate' and she accepted that it should be seen only as 'careless'. Apart from that, the conditions for a discovery assessment had clearly been present and there was no dispute that tax had been correctly calculated.

Conclusions

15 No case has been put that the outstanding tax which has been assessed was not due or was not correctly calculated, and there is therefore no ground upon which we can allow an appeal against the liability. In so far as interest is concerned, the Revenue have correctly pointed out that there is no right of appeal, the reason being that statutory interest is simply the fiscal equivalent of what any debtor has to pay to a creditor for late payment of a debt owed.

16 The matter of the penalty is however different. Mrs Cawardine has very properly accepted that the categorisation of the executors' conduct as 'deliberate' was too hasty and took insufficient account of all the facts, including the executors' good faith. But, that said, as a general rule the tribunal has no jurisdiction in relation to issues of maladministration, so that the delay in responding to Mr Usher's letter of 26 September 2013 is for the Revenue Adjudicator (or the Parliamentary Ombudsman) to deal with if the complaint about it is maintained.

17 Paragraph 17(2)(b) of Schedule 24, however, provides a very limited exception to this principle in so far as it enables the tribunal in an appeal under paragraph 15(2) – as this is – to substitute for the Revenue's decision as to the amount of the penalty "another decision that HMRC had power to make". Under paragraph 11 of the Schedule, HMRC could have reduced the penalty "because of special circumstances"; neither of the possible special circumstances which are excluded from this power by paragraph 11(2) are in point in this case.

18 We bear in mind that, by taking on themselves the administration of an estate, the appellants chose to risk the consequences of whatever shortcomings in their legal or accountancy knowledge there might prove to be. It is not our function, or the Revenue's obligation, to relieve the appellants of the results of their choice to undertake that work without professional assistance. The fact that ignorance of the procedure to guard against late claims left the executors vulnerable to the assessments made must therefore be disregarded, as must their inexperience in handling accounts - which doubtless led to the error.

19 Nonetheless, the circumstances overall seem to warrant some consideration of special circumstances. The categorisation by the Revenue of the erroneous return as deliberate was made without adequate consideration of the case – the more so if the executors had, as they claimed, asked actually to meet officials and had been refused. The delay in dealing with it is, as we have said, something which the tribunal could not normally take into account, but in this instance it is something we can look at - bearing in mind that it was a factor which the Revenue themselves had power under paragraph 11 to consider, and appear not to have done.

20 Rather than adjourn the appeal for the use of the paragraph 11 power to be considered by HMRC, we think the right course is to substitute our own decision in accordance with paragraph 17(2)(b) – even though this is in the nature of it a discretionary course, and one which we adopt with hesitation on that account.

21 The factors we have been influenced by are: (i) that executors have told us that they are far from sure that they will find the beneficiaries, particularly the charities, willing to reimburse them the tax at issue and which they must still pay, and (ii) that the Revenue have admitted that their own delay in dealing with the case was blameworthy – which we add, had it not occurred, might well have spared Messrs Usher and Perkins the difficulty they are in now. On balance, we have thought it right therefore to reduce the penalty in this case to nil. The assessment to tax however must stand good, and with it the interest due.

22 It is to be hoped that all the beneficiaries – eight individuals and four charities: Amnesty International, the National Deaf Children's Society, Hearing Dogs for the Deaf and the Samaritans – will see virtue of reimbursing what they should, by rights, not have received if everything had been done correctly. It may also be argued that had the executors retained professional assistance in the administration of the estate the beneficiaries would have had to bear that cost and would therefore have received correspondingly smaller legacies. But these are matters over which we have no jurisdiction, and they must be left to the goodwill of all concerned.

Appeal rights

23 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 29 January 2016