[2017] UKFTT 538 (TC)

TC05987

Appeal number: TC/2016/03761

INCOME TAX – Schedule 55 FA 2009 - penalties for failure to file return on time – executor of deceased taxpayer required to file trust and estate return for administration period – whether notice to file given: yes – whether trust and estate return is one prescribed for s 8 TMA 1970: on balance, no – in alternative, whether appellant had reasonable excuse: no – whether HMRC decision on special circumstances flawed: yes, HMRC failed to take s 8B TMA into account – penalties cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID HOGG (as executor of Mrs B Dodd)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 27 June 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 11 July 2016 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 March 2017.

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DECISION

1. This is an appeal by Mr David Hogg ("the appellant") against the assessment by the respondents ("HMRC") of daily penalties for failing to make a return of the income of an estate of which he was the executor.

Facts

2. I have extracted from the bundle of papers the following and they are my findings of fact.

3. The appellant is the executor of Betty Dodd, who died on 24 August 2013. He obtained probate on 27 November 2013.

4. On 9 September 2013 a Form R27 was issued to the appellant. The actual form completed is not in the file but I can see from an online version of the form, which was withdrawn in October 2014, that it included a formal claim for repayment for the tax year that includes the date of death and also asked for details of the administration of the estate.

5. One of the questions it asked, question 11, is:

> "During the administration period, are the proceeds from the sale of the estate's assets in any one tax year likely to be more than £250,000?"

The appellant sent the form back to HMRC on 28 March 2014 and from the correspondence it is clear that he said "Yes" to question 11.

6. It is also clear from the correspondence that, in answer to question 13, he said that the administration was due to end in less than 3 months.

7. From the online version of the form it can be seen that question 12 is:

> "Do you expect the estate to get any untaxed income or sell any chargeable assets during the administration period?"

If the answer is "No", nothing more is required. If it is yes, the question is asked:

> "Is the total tax payable on any untaxed income or Capital Gains Tax likely to be more than £10,000?"

If the answer is "No", the Form R27 says:

> "Once the administration period has ended you must send us this information so we can work out the tax due. **As personal representative for the deceased you are responsible for telling us this information**"

If the answer is "Yes", the Form says:

> "We will send you a tax return at the end of the tax year"

I do not know what the appellant's answer to that question was.

8. At the end of the page after Question 13 the R27 says:

> "If you have answered **Yes** to question … 11 we will send you a tax return at the end of the tax year."

9. On 2 April 2014 the appellant was told that a Self Assessment record had been set up for the estate.

10. HMRC's SA Notes show that on 15 April 2014 the estate is shown as having "first notified" on 5 March 2014, and that a 2013-14 return was issued with "CG pages" and an AP7 letter sent to the appellant's solicitors, Gamlins Law. I do not have a copy of and do not know what an AP7 letter is, but I assume "AP" stands for "administration period".

11. On 4 March 2015 Gamlin Law say they received a late filing penalty assessment of £100 for the tax year 2013-14. The penalty was paid on 10 March 2015 and in a letter of the same date they said:

> "we believe the return has been issued because an indication was previously given that the proceeds of the estate assets would exceed £250,000. This is correct. However, the nature of the assets of the estate are such that we do not believe any untaxed income will have arisen since Mrs Dodd died. Furthermore, subject to checking we do not believe that any chargeable gains will have arisen.".

12. They added that they were about to produce estate accounts up to the end of the administration period and once they were completed they would submit the return for 2013-14 which they expected to be a nil return.

13. A tax return for 2013-14 was submitted in paper form on 26 March 2015 with a cheque for £12.03, the income tax liability at the basic rate for the year. HMRC's SA Notes show the record of the return being received was made on 16 April 2015.

14. HMRC records show that the appellant was issued with a notice to file an income tax return for the tax year 2014-15 on 6 April 2015. That notice required the appellant to deliver the return by 31 October 2015 if filed in paper form or by 31 January 2016 if filed electronically ("the due date").

15. On 10 April 2015 Gamlin Law say they received a daily penalty of £580.

16. On 14 April 2015 Gamlins Law wrote to HMRC appealing against the daily penalty which they regarded as "unconscionable and unfair". They also said they had not received any acknowledgment of their appeal against the £100 penalty made on 10 March 2015.

17. They added that they had not been able to complete the estate accounts for the estate in time to deliver the return for the year and repeated some of the text of their letter of 10 March 2015 as in §11, adding that the estate was being penalised for an honest answer on the R27.

18. They further pointed out that the initial penalty was 8 times greater than the tax due and the daily penalty was 48 times greater than the tax. They asked for a reconsideration.

19. Gamlins Law's letter of 14 April evidently crossed with a letter also dated 14 April from HMRC to them. That letter was headed "Appeal against the penalty for sending your Self Assessment tax return in late for the 2013 to 2014 (*sic*) tax year."

20. This letter is evidently a reply to Gamlins Law's appeal against the £100 initial penalty. It gives HMRC's view which is that there is no reasonable excuse shown. It gives the recipient three options, to provide further information, ask for a review or notify the Tribunal, and the chosen action must be taken by 14 May 2015.

21. On 1 May 2015 Gamlins Law spoke to HMRC about the daily penalty. Gamlins Law's chronology of the matter supplied to the tribunal says that they were told that each case is looked at individually and that they could expect to hear further regarding the penalty. The chronology says that on 29 April 2015 HMRC told Gamlin Law that they could not deal with them in the absence of a Form 64-8 (authorisation of agent). Gamlin law say that the final pre-death return showed Gamlin law as agents.

22. On 2 June 2015 HMRC wrote to Gamlins Law to say that their letter of 10 March had been forwarded to "Edinburgh Trusts".

23. On 17 February 2016 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

24. On 10 March 2016 the appellant through Gamlins Law appealed to HMRC against the penalty of £100. They informed HMRC that, as they had said in their letter of 22 April 2015, they were distributing the estate and that gross deposit interest of £25.98 had arisen, the tax on which was £5.20 which they paid by cheque on 22 April 2015. They asked for the penalty to be removed.

25. On 14 April 2016 HMRC informed Gamlins Law that they could not consider the appeal because the return had not been filed and they returned the letter of 10 March. They did not reject the appeal for not showing a reasonable excuse for the failure to file on time. They informed Gamlins Law that the return could be filed online and that daily penalties would apply for a return more than 3 months late.

26. The return was filed in paper form on 21 April 2016 and was accompanied by an appeal, although a copy of that letter dated 21 April 2016 was said by HMRC not to be in the bundle. Thus I do not know what reasonable excuse was put forward.

27. On 16 May 2016 Gamlins Law told HMRC that they had not replied to their "renewed appeal".

28. On 15 June 2016 HMRC rejected the appeal against the initial penalty and daily penalties (but see §25) as they said that the appellant had shown no reasonable excuse for the failure to file on time. It appears from the letter of 15 June that the appeal was

on the basis that a return should not have been required, as HMRC's rejection of their excuse was on the basis that because Gamlins Law had given a "Yes" answer to question 11 on the R 27 a record was set up and notices to file issued.

29. They also informed Gamlins Law that the appellant could provide further information, request a review or notify his appeal to the Tribunal, and added that failure to do any of those things within 30 days would lead to the appeal being deemed to be settled under s 54 Taxes Management Act 1970 ("TMA").

30. On 21 June 2016 HMRC issued a notice informing the appellant that a penalty of £820 had been assessed for failure to file the return by a date 3 months after the due date. Oddly the letter of 15 June 2016 had referred to an appeal against the daily penalties which had not then been assessed.

31. On 11 July 2016 Gamlins Law notified appeals against daily penalties to the Tribunal, saying they accept the initial penalty of £100.

The law

32. The law imposing these penalties is in Schedule 55 Finance Act 2009. The only parts of that Schedule relevant to this case are as follows.

> "**Penalty for failure to make returns etc**
>
> 1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.
>
> …
>
> (4) In this Schedule—
>
> "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;
>
> "penalty date", in relation to a return or other document falling within any of items 1 to 3 … in the Table, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).
>
> (5) In the provisions of this Schedule which follow the Table—
>
> (a) any reference to a return includes a reference to any other document specified in the Table, and
>
> (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document

1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

3 P is liable to a penalty under this paragraph of £100.

4—(1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

…

Special reduction

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(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.

Cancellation of penalty

17A—(1) This paragraph applies where—

(a) P is liable for a penalty under any paragraph of this Schedule in relation to a failure to make a return falling within item 1 or 2 in the Table, and

(b) HMRC decide to give P a notice under section 8B withdrawing a notice under section 8 or 8A of that Act.

(2) The notice under section 8B of TMA 1970 may include provision under this paragraph cancelling liability to the penalty from the date specified in the notice.

…

Assessment

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

…

Appeal

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

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

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(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 16—

(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 16 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.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

Reasonable excuse

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

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

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(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

(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."

The appellant's submission

33. In the Notice of Appeal the appellant's grounds of appeal are that:

(1) at no stage did the appellant or his solicitors receive a request to submit a formal tax return for the year ended 5 April 2015.

(2) the appellant's solicitors assumed that the payment of £12.03 finalised the matter to the date of distribution of the residuary estate without the need for a formal return.

(3) the appellant feels that HMRC should have accepted the £100 penalty originally paid in full and final satisfaction of their claim, as well as the amounts of £12.03 and £5.20.

(4) in another case with which the solicitors had had conduct a declaration by letter of the administration income was accepted without a formal tax return and without penalties, so HMRC are being inconsistent.

HMRC's submissions

5 34. HMRC say in the Statement of Case as their view that:

(1) the appeal is not concerned with specialist or obscure areas of tax law, but with the ordinary and everyday responsibilities of Mr Hogg to ensure that the Trusts and Estate tax return for the estate of Mrs Dodd was filed by the legislative [*sic*] date.

10 (2) a self assessment record was set up for the appellant because he notified that the sale of assets would bring in more then £250,000, as explained on the Government website which clearly says that informal arrangements can be made only if "you don't need to send a tax return".

(3) a tax return for 2013-14 with capital gains pages was issued to Mr Hogg, 15 and a copy of "the AP7 letter" was sent to Gamlins Law as demonstrated by the SA Notes.

(4) an appeal for 2013-14 on the basis set out in §11 was turned down because the notice to file had been issued.

(5) there was no reasonable expectation that the return for 2014-15 would not 20 be required and the rejection of the appeal for 2013-14 should have made it clear that an appeal on the same basis would not succeed.

Discussion

35. In dealing with the grounds of appeal I remind myself that the burden of proof is on HMRC to show that the penalties are properly imposed. I have to remind myself 25 because HMRC do not mention it in the statement of case.

What appeals are before me?

36. Before considering the arguments there are some preliminary matters to be determined. One of them is what exactly has been notified to the Tribunal.

37. The Notice of Appeal to the Tribunal shows that the amount of the "tax or 30 penalty or surcharge" being appealed is £820. In section 8 Gamlins Law say that "we accept and have paid the original penalty of £100". This is not an entirely logical approach. If they accept the £100 penalty they are accepting that they filed late (which they undoubtedly did) and are implicitly accepting that that there was no reasonable excuse, because where a reasonable excuse is put forward it can only be 35 for the failure to file at the correct time, a single failure which may give rise to up to four separate penalties.

38. However many appellants to this Tribunal take the view that a £100 penalty is a reasonable slap on the wrists for a failure and cannot be bothered to contest it, and in a case where solicitors are acting the cost of arguing an appeal would obviously 40 outweigh the amount of the penalty.

39. I therefore approach the appeal against the daily penalty with no preconceptions about whether there can be a reasonable excuse.

40. Another puzzle though is whether the daily penalty for 2013-14 was intended to be included in the appeal. The grounds of appeal are equally applicable to that case and refer extensively to the 2013-14 position. Indeed the reference to an amount of £12.03 as determining the position can only be a reference to 2013-14.

41. I also note that HMRC seem to have overlooked the appeal against the 2013-14 daily penalty entirely. They deal with the initial penalty by rejecting any reasonable excuse and that does not seem to have been followed up. But Gamlins law did pursue the question of an appeal against the daily penalty but were told that responsibility had been passed to Edinburgh Trusts, with nothing further happening. I therefore consider that as both daily penalties were under appeal then both appeals have been notified to the Tribunal.

Was a notice to file a return given to the appellant?

42. The appellant says he did not receive a notice to file ("a request to submit a formal tax return") for 2014-15. HMRC say that a notice to file for 2014-15 was issued to Mr Hogg, the executor.

43. HMRC's evidence of issue consists of two documents. The first is the "Return Summary" for 2014-15, a screenshot of the computer record for the "estate of Mrs B Dodd". This shows:

Return Issued Type	Notice to file
Return Issued Date	06/04/15

44. Other paper cases I have dealt with recently show alternative descriptions in "Return Issued Type" including "Full Return" and "Short Return". What I take from these different descriptions is that where the "type" is "Notice to file" there is a separate document which is not part of a return which also contains as its first paragraph a statement that the recipient is required by law to send the document to HMRC when completed.

45. There is also an entry on the "SA Notes" which show that on 15 April 2014 "2013-14 Return with CG Pages issued." This is clearly a reference to a full return, not a notice to file.

46. Nothing else in the SA Notes throws any light on the question of the issue and giving of a 2014-15 notice to file. I have examined all the correspondence exhibited and nothing in it shows any awareness by Gamlins Law that a notice to file had been given to the appellant or came to their attention. They do refer to, and were clearly aware of, a notice to file a return for 2015-16 being issued on 6 April 2016.

47. There is no indication in the document bundle of the address that was used in relation to the notice to file for 2014-15. But the return for 2013-14 was obviously received and there is nothing in the SA Notes to indicate either that an address was

changed or that an "RLS" (Returned letter service") signal was set at any time to indicate that post had not been delivered.

48. I think it more likely than not that a notice to file was issued on 6 April 2015 as indicated in the HMRC records. As a notice to file is a statutory document then s 115(2) TMA 1970 allows it to be given to a person by serving it addressed to that person at his usual or last known place of residence. I have no reason to think it was not properly addressed and stamped and therefore, by s 7 Interpretation Act 1970 it is treated as having been duly served (and so given) unless the contrary is proved.

49. Proof to the contrary is not the same as assertion, even by a solicitor, that the client did not receive it, nor is an assertion that they did not receive an agent's copy.

50. I consider that it is more likely than not that the notice was given.

There is more than one type of tax return.

51. But what did the notice require? TMA and Schedule 55 FA 2009 provide for four types of income tax return[1] failure to deliver which can lead to penalties. They are a return under s 8 TMA, a return under s 8A TMA, a return under s 12AA TMA and a return under s 12A TMA. The last two of these can be ignored as they are a return that is only relevant to a partnership or an LLP or to an EEIG[2] respectively.

52. Since Mr Hogg is not a trustee of any settlement the appropriate return and notice to file cannot be one under s 8A TMA. It must perforce be one under s 8 TMA. But HMRC refer in the correspondence in the bundle to the return as a "Trust and Estate Return" and to its being on form SA900. The SA900 is indeed headed "Trust & Estate Return" and it is very clear from the specimens on HMRC's website that it is a return under s 8A TMA for trustees. All the questions bar one (Question 23) cover trusts and some (Questions 12 to 16) are specifically only for trustees.

53. The question that arises is whether the Trusts & Estates Return in form SA900 is also a return under s 8 TMA for an executor, and indeed whether a single document can be a return under s 8 for some persons and a return under s 8A for others.

54. If one looks at the historical development of the tax return it can be seen that in TMA as enacted there were two types of return under s 8, a return under s 8(1) for a person of "his income" and a return under s 8(2) for a person of "income which is not his income, but in respect of which he is chargeable in any capacity specified in the notice". A s 8(2) return, made on Form 1 rather than on Form 11 which was the return under s 8(1), could obviously apply to both trustees and executors, who were not returning *their* income but the income which they received in their capacity as trustee or executor, and which was liable to the income tax at the standard or basic rate only.

[1] I am ignoring for this purpose returns of tax that is withheld on account of another person's liability

[2] European Economic Interest Grouping

55. This division was changed by FA 1990 which substituted a new s 8 and inserted a section 8A into TMA. Section 8 was headed "personal return" and dealt with "persons" and was expressed to be for the purposes of assessing a person to income tax. Section 8A was headed "Trustee's return" and was expressed as being for the purposes of assessing a trustee of a settlement, the settlors and beneficiaries to income tax.

56. Both sections contained a provision that allowed different information, accounts and statements to be provided, but in s 8(4) it was for "different descriptions of person" and for s 8A(4) it was for different descriptions of settlements. It is clear from this that executors moved from the same provision as applied to trustees (s 8(2) TMA as originally enacted) to s 8 TMA as substituted by FA 1990, and not to s 8A.

57. When self-assessment was brought in by FA 1994 both s 8 and s 8A were amended. Section 8(1) was now expressed to be for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax", while s 8A(1) was "for the purpose of establishing the amounts in which the relevant trustees of a settlement, and the settlors and beneficiaries, are chargeable to income tax and capital gains tax". A new difference between s 8A and s 8 was that in s 8A(1) it was provided that "a notice may be given to any one trustee or separate notices may be given to each trustee or to such trustees as the officer thinks fit". Sections 8(4) and 8A(4) remained as they had been.

58. The removal of the reference in s 8(1) as enacted to "his income" establishes beyond doubt that an executor can be within s 8 TMA and is not within not s 8A as regards a return of the income and chargeable gains of the estate of which they are executor. But an executor who registers to file online is not sent an SA100, the tax return which individuals returning their own income file, but an SA900. As I have noted (§56) s 8(4) permits a notice to file to require different information etc in relation to different descriptions of person. It has clearly been used to require a different form or different pages for eg a Lloyd's underwriter (SA103L), a Member of Parliament and other devolved legislatures (SA102MP etc), a member of the clergy (SA102M) and a non-resident individual (SA109). In all these cases it is the SA 100 which is modified or varied. In the case of non-resident companies liable to income tax a different return form, SA 700, is used.

59. The position with executors is different as the return they are expected to file is not an SA 100 nor are there special pages to be added to that return. The return they are expected to file is the SA900, the same return as is used by trustees and which is clearly a return under s 8A TMA when a trustee is required to file it. Is it possible to have a return which is partly required under s 8 when it is an executor required to file it, and partly under s 8A when it is a trustee? I am very doubtful whether this is possible, but I might be persuaded if I had been shown a document minuting the prescription by the Board under s 113(1) TMA to the appropriate effect, although even if I were to see that document I would still need to consider whether it was legally possible to prescribe the same document as a return under two different sections of TMA.

60. The burden of proof is on HMRC to show that a penalty has been properly imposed. They have to show among other things that a person who is not acting as a trustee has been required by s 8 TMA to file a return called a Trusts and Estates Return and which is clearly in most circumstances a return under s 8A TMA. For the reasons given above I hold that they have not discharged that burden. They have not therefore shown that there was a failure to file a return required by law of the appellant and so the daily penalties for 2013-14 and 2014-15 cannot stand.

61. On this basis the initial penalties are also unlawful and I expect, but cannot require, HMRC to repay them.

Are the daily penalties validly imposed?

62. Had I not held as I did in §60 I would have cancelled the daily penalties anyway.

63. There is no "SA reminder" or "SA 326D" in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with. (See *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)).

Was there in any case a reasonable excuse?

64. If I had not held as I have in §60 or §63, or if, on appeal, my decision were to be overturned, then the question of whether the appellant had a reasonable excuse for its failures to file the SA 900 in time would arise.

65. In my view there was no reasonable excise for the failure, once HMRC had decided to require by notice the fling of the return. That it takes time to prepare accounts of an estate may be true but, as HMRC point out, an estimate is all that is required.

Were there special circumstances?

66. Similarly had I not held as I have in §60 and §63 the question of a special reduction would have arisen. HMRC have addressed the question whether there were special circumstances, but have found none. They say they have taken into account the lawyers' argument that they thought they could "conclude" the tax liabilities informally but HMRC do not think that that belief amounts to special circumstances.

67. HMRC have not taken into account the change in law and their own practice in relation to withdrawing a return where the circumstances require it. Section 8B TMA, applying for 2012-13 onwards, says that HMRC may withdraw a notice to file, at the request of a person or *otherwise*. They therefore do not have to get a request from the person given notice and there is nothing in s 8B to limit the circumstances or grounds on which HMRC may withdraw a notice to file.

68. HMRC's Guidance Manual on this, the Self Assessment Manual, sees things differently. At SAM 120115 it says:

> "However, for tax years 2012-2013, and later, an individual, partnership or trustee can request that we withdraw a notice to file and, if the customer no longer satisfies SA criteria for that year, we can agree to withdraw the notice, unless the customer is RLS, and cancel any penalties for failing to file the return, under Schedule 55 FA2009. An agent can also request, on the customers' behalf, that the notice is withdrawn and we will accept the request as long as the customer has authorised the agent to act on their behalf."

69. The SA criteria are found at SAM100060 and in the case of untaxed interest (the only income of the estate in the year) the criterion is that an individual is receiving untaxed income of £2500 or more.

70. SAM100160 also says that:

> "Wherever possible, the personal representative should be encouraged to settle any liability under the voluntary payment arrangement if it fits the criteria."

This would logically be read as a reference to the criteria set out a few pages earlier at SAM100060.

71. However the correspondence in the case appears to refer to different criteria (see §§4 to 9). The most likely source in HMRC Guidance is the Trusts, Settlements and Estates Manual which has a page (TSEM 7410) headed "Deceased persons: conditions for informal payment procedures" (ie the procedures referred to by Gamlins Law mentioned by HMRC (see §6)). That says:

> "Personal representatives may make an informal payment of the total liability for the whole period of administering the deceased's estate if certain conditions are met. The main condition is that the total tax liability (income tax plus capital gains tax) for the entire administration period is less than £10,000. The other conditions are that
>
> - the probate/confirmation value of the estate is less than £2.5m, and
> - the proceeds of assets sold in any one tax year are less than £250,000, and
> - the estate is not regarded as complex, so it can be dealt with without the personal representatives having to complete a Self Assessment return.
>
> …
>
> **SA return issued**
>
> Informal payments may not be accepted where a Self Assessment return has been issued to the personal representatives. In such circumstances, the personal representatives are under an obligation to complete and send back the return. …
>
> **SA record created**

> If a Self Assessment record has been created but no return issued, and the case meets the conditions for informal payments, make the record dormant to prevent the issue of returns and proceed in accordance with these instructions."

72. The reason why an SA record was set up and a notice to file or return issued was it seems the second of the minor conditions (not, it is to be noted, called criteria here), the main condition being handsomely met.

73. But this second minor condition is not quite the same as Question 11 on the R27. That question "During the administration period, are the proceeds from the sale of the estate's assets in any one tax year likely to be more than £250,000?" is being asked of course at an early stage. The condition in TSEM is not looking to the future like the R27 ("likely to be") but is looking at the immediate past, "assets sold in any one tax year". What is the purpose of making this a condition? The only sensible answer is that there is a possibility of chargeable gains arising if assets are sold for £250,000 or more. It cannot be to alert HMRC to the possibility of income arising from the proceeds when invested as that would be covered by the main condition.

74. In this case Gamlins Law informed HMRC that no chargeable gains arose. That means that the second minor condition was not fulfilled and so even if the conditions are SA return criteria as referred to in SAM 100060, HMRC should have taken the initiative to withdraw the notice to file under s 8B TMA and to cancel any penalties assessed in accordance with paragraph 17A Schedule 55 FA 2009.

75. Their failure to do so means that they failed to take into account something which they should have done and there was also an error of law in not applying s 8B TMA. Their decision was flawed in judicial review terms and so I would have reduced the daily penalties to nil had it been necessary to do so.

Decision

76. The appeals against the daily penalties for 2013-14 and 2014-15 are upheld, and the penalties are cancelled.

77. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 03 JULY 2017