TC02216

Appeal number SC/3215/2006

CAPITAL GAINS TAX — failure to disclose chargeable gain — penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

OLIVER ISAAC INY **Appellant**

- and -

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

TRIBUNAL: JUDGE COLIN BISHOPP
JOHN CHERRY FCA

Sitting in public in London on 2 July 2012

The appellant in person

Mr Michael Gibbon QC for the Respondents

DECISION

1. This is the continuation of an appeal by Mr Oliver Iny against an assessment to capital gains tax in respect of a chargeable gain which the Commissioners say accrued to him in the year 1994-95. We determined the issue of principle, that is whether Mr Iny had made a gain, against him and provisionally reached a conclusion about the value of the asset disposed of (shares in a private company) following a hearing in January 2010: see [2010] UKFTT 457 (TC). Mr Iny was given the opportunity of putting in evidence about that valuation but failed to do so and, by a direction of 7 December 2011, the value of the shares was determined at £2,129,526. The tax due, after taking into account the acquisition cost, indexation and Mr Iny's annual exemption, amounts to £849,449.20.

2. The disposal was not disclosed by Mr Iny's tax return for the year and, when the Inland Revenue (as the body then responsible for the administration of capital gains tax) discovered the omission, they began enquiries which led not only to an assessment for the tax, but also to the imposition of a penalty of £260,400, representing 35% of what was then thought to be the correct amount of tax (£744,000). Mr Iny appealed against the penalty as well as the tax assessment, but we did not determine the penalty appeal when deciding the issue of principle in respect of the tax assessment since the amount of the penalty is linked to the amount of the tax, and it was not appropriate to deal with it until the correct amount of tax had been found.

3. Although the hearing to which this decision relates was convened to consider only the penalty appeal, Mr Iny asked us to set aside the direction of 7 December 2011, and to allow him further time to adduce the evidence on which he wished to rely in order to undermine the valuation of the shares at which we had provisionally arrived and, consequently, the tax due. His case was that the shares had, in truth, no value. His application was opposed by HMRC.

4. Mr Iny's argument was that he had suffered from illness since the first hearing, had tried to set himself up in a new business which had failed, and that he had encountered great difficulty in contacting the two witnesses on whose evidence he wished to rely, as one is in Iraq and the other in the United States. He had, however, now succeeded in doing so, and both had agreed to help him. He did not, however, have any statement, even in draft, a summary of the expected evidence, a letter or anything else to produce to us, and we are bound to say that his explanation to us of what he expected the witnesses to say was extremely vague, and in many respects not to the point.

5. We also cannot disregard the fact that Mr Iny has had many and prolonged opportunities to produce the evidence on which he wishes to rely. The relevant disposal was made in October 1994, the return was submitted in March 1997, the enquiries began in March 1998, after some correspondence there was a meeting with Inland Revenue officers, attended by Mr Iny and his adviser, in January 2000, the assessment was made in January 2001 and appealed the same month, and the penalty was imposed in December 2005. The hearing of the tax appeal took place in January 2010 and, as we have said, Mr Iny was given but failed to take the opportunity to put in the evidence, even though he asked for and was given extensions of time for doing so. We add the background, to which we

referred in our decision, of a strange reluctance or failure to produce evidence of the trust of which he is a beneficiary, despite the fact that it is a family trust; and it defies belief that that evidence is not available to him.

6. In all those circumstances we concluded that there was no proper basis on which we could allow any further indulgence to Mr Iny. The direction of 7 December 2011 is not set aside, and the value of the shares disposed of remains determined at £2,129,526. The tax due is correctly calculated at £849,449.20.

7. The penalty is exigible by operation of s 95 of the Taxes Management Act 1970 (since repealed and replaced, but in force for the relevant year), which allowed for the imposition of a penalty "not exceeding the amount of the difference" between the tax actually due and the amount which would have been due had the return been correct. In this case the difference is the figure we have mentioned, £849,449.20. The amount of a penalty in any individual case was to be determined in accordance with s 100 of the 1970 Act, at the amount an officer of the Board considered "correct or appropriate". We may adjust the amount imposed, in accordance with s 100B.

8. Neither section gives any guidance about the criteria to be adopted in determining the penalty in an individual case, but it has long been the Commissioners' practice to reduce the penalty from the maximum possible to take account of cooperation by the taxpayer, disclosure (particularly unprompted) of the relevant income or gain, and the seriousness of the taxpayer's conduct referable, in essence, to amount and any aggravating factors. The reductions are determined by use of what is essentially a tariff, allowing differing percentages for the various elements. In this case the officer decided that the aggregate reduction should be 65% and the penalty imposed was therefore 35% of the tax then thought to be due. It now represents a little more than 30% of the tax properly due.

9. In adjusting a penalty we are not bound by the Commissioners' tariff, or even the factors they take into account, but may reduce (or increase) a penalty which is the subject of an appeal on any grounds we think fit, within the parameters of the proper exercise of judicial discretion. In practice, the tribunal respects the Commissioners' tariff, in the interests of consistency between taxpayers, while departing from it in an appropriate case.

10. For the Commissioners, Mr Gibbon QC argued that the discount from the maximum penalty which had been allowed by the Inland Revenue when it was imposed now seemed generous, since subsequent events showed that Mr Iny had been less cooperative, and less forthcoming, than the officer concerned had believed was the case at the time. We agree with that assessment; it became clear to us, as we recorded in our decision, that Mr Iny knew and remembered more than he was prepared to admit, that he was evasive, and that even on his own case there was no excuse for the omission from his return of the £20,000 he received for the shares; his argument that they were in fact worthless could not avail him if (as was his case) this was an arm's length disposal. He told us that he "would have" told the accountants who prepared the relevant return for him that he had made the disposal, but his evidence in respect of this contention, too, was vague, inconsistent with other material available to us, and unsupported by documentary

evidence. He added (though this argument too is inconsistent with his assertion that he told his accountants) that he was heavily occupied at the time with the affairs of the public company of which he was the chief executive officer, that his personal affairs were of secondary importance, and that he did not have an eye for detail. He accepted that he had signed a return, including a declaration of completeness and accuracy, without properly checking it, saying that he trusted his accountants and signed whatever was presented to him by them. That may be true, but it cannot absolve him of the responsibility of checking his return carefully, which plainly he did not.

11. Despite his argument that the reduction allowed was generous, and despite the fact that the penalty now represented an even smaller percentage of the tax than was thought when it was imposed, Mr Gibbon did not urge us to increase it. We have decided not to do so, partly because this is a stale case, which Mr Iny has had hanging over him for many years (even if much of the blame for that is his own), and partly because we are reluctant to increase penalties save in clear cases since doing so may deter those with meritorious appeals from pursuing them for fear that the penalty might be increased. We bear in mind too that a penalty exceeding a quarter of a million pounds is a very large sum for an individual to find. We are not, however, persuaded that there is any basis on which we could properly reduce the penalty further. It will therefore remain at £260,400.

12. This document contains full reasons for the decision. Any party dissatisfied with this decision or with the earlier decision in principle released on 1 October 2010 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.

COLIN BISHOPP
CHAMBER PRESIDENT

RELEASE DATE: 10 July 2012