[2018] UKFTT 595 (TC)

TC06757

Appeal number: TC/2013/00907

INCOME TAX – penalties for failure to deliver return by due date – whether trustees of an IIP trust mandating all income to life tenant and with no chargeable gains can be served with a notice to file under s 8A TMA: held no, so penalties not valid – if wrong, whether reasonable excuse or special circumstances – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRUSTEES OF THE PAUL HOGARTH LIFE INTEREST TRUST 2008 — **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 11 September 2018 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 4 January 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 25 June 2018.

DECISION

1. This was an appeal by the trustees of the Paul Hogarth life interest trust 2008 ("the appellant") against assessments to penalties under Schedule 55 Finance Act 2009 for the failure to deliver a return for the tax year 2010-11 by the due date. The trust is an interest in possession trust ("IIP") where the income is, by mandate of the trustees, paid directly to the life tenant, and is not received by the trustees.

Facts

2. HMRC records show that a notice to file an income tax return for the tax year 2010-11 was issued on 6 April 2011 to what is described on those records as the "Paul Hogarth life interest trust 2008". That notice would have required the recipient to deliver the return by 31 October 2011 if filed in paper form or by 31 January 2012 if filed electronically ("the due date").

3. On 14 February 2012 HMRC records show that they issued a notice of the assessment of a penalty of £100 because of a failure to file the return by the due date.

4. HMRC records show that on 7 August 2012 they issued a notice of the assessment of a penalty of £900 because of a failure to file the return by a date 3 months after the due date and for 90 days after that and a notice of assessment of a penalty of £300 because of a failure to file the return by a date 6 months after the due date.

5. The return was delivered electronically on 5 September 2012.

6. On 3 October 2012 the appellant, through their agents Forbes Dawson LLP, appealed to HMRC against the penalties.

7. On 19 October 2012 HMRC rejected the appeals as they said that the appellant had shown no reasonable excuse for the failure to file on time. They were told that HMRC's view was that:

> "a reasonable excuse will only apply (*sic*) when an exceptional event beyond your control has prevented you from sending your return in on time. Each case is considered on its facts."

8. HMRC informed the appellants that they could have a review or notify the appeal to the Tribunal.

9. On 24 October 2012 the appellant's agents accepted the offer of a review, and sent in a copy of a letter dated the same day which they had sent to the officer who wrote to them on 19 October.

10. On 6 December 2012 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld.

11. On 4 January 2013 the appellant notified their appeals to the Tribunal. On 7 March 2013, at the request of HMRC, the Tribunal stayed this appeal behind an appeal

to the Upper Tribunal from the decision of this Tribunal in the case of *Morgan & another v HMRC* ("*Donaldson*"). The stay was renewed and then directions of 5 September 2013 stayed this appeal until 60 days after the issue of the Upper Tribunal decision in *Donaldson*. That decision was issued on 2 December 2014.

12. On 16 May 2018 the tribunal wrote to the agents and to HMRC to say that *Donaldson* was now final and this appeal would proceed. There is nothing in the papers I have which show what if anything happened 60 days after 2 December 2014 when the stay directed on 5 September 2013 expired.

The law

Schedule 55 Finance Act 2009

13. Paragraph 1 Schedule 55 Finance Act ("FA") 2009 provides for penalties to be imposed:

> "**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.
>
> …
>
> (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;
>
> …

	Tax to which return etc relates	Return or other document
2	Income tax or capital gains tax	(a) Return under section 8A(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8A(1)(b) of TMA 1970

> 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.
>
> …
>
> (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."

Who is P in the case of a trust?

(a) Filing returns

14. In paragraph 1 Schedule 55 P is the person who fails to make or deliver a return, so must be the person who is required by law to make or deliver that return. The return in question for trusts is that described in s 8A Taxes Management Act 1970 ("TMA") (as mentioned in item 2 in the table in paragraph 1 Schedule 55).

15. Section 474 Income Tax Act 2007 ("ITA") provides a general rule for trustees:

> "(1) For the purposes of the Income Tax Acts (except where the context otherwise requires), the trustees of a settlement are together treated as if they were a single person (distinct from the persons who are the trustees of the settlement from time to time)."

16. Leaving aside the somewhat tricky question whether TMA is part of the Income Tax Acts, this section would seem to give the answer unless a contrary provision can be discerned from the context. Section 8A TMA seems however to be such a provision. It provides:

> "(1) 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 for a year of assessment, and the amount payable by him (*sic*) by way of income tax for that year, an officer of the Board may by a notice given to any relevant trustee require the trustee—
>
> (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required;
>
> and 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.
>
> (1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source.

…

(1F) The Commissioners—

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of settlement.

(5) The following references, namely—

(a) references in section 9 or 28C of this Act to a person to whom a notice has been given under this section being chargeable to tax; and

(b) references in section 29 of this Act to such a person being assessed to tax,

shall be construed as references to the relevant trustees of the settlement being so chargeable or, as the case may be, being so assessed."

17. The meaning of "relevant trustees" is given by s 7(9) TMA:

"(9) For the purposes of this Act the relevant trustees of a settlement are—

(a) in relation to income (other than gains treated as arising under Chapter 9 of Part 4 of ITTOIA 2005, the persons who are trustees when the income arises and any persons who subsequently become trustees; and

(aa) in relation to gains treated as arising under Chapter 9 Part 4 of ITTOIA 2005, the persons who are trustees in the year of assessment in which the gains arise and any persons who subsequently become trustees; and

(b) in relation to chargeable gains, the persons who are trustees in the year of assessment in which the chargeable gains accrue and any persons who subsequently become trustees."

18. Section 7 TMA itself is concerned with whether a person is obliged to notify their chargeability to income tax or capital gains tax ("CGT"). It uses the word "persons" in

relation to trustees and s 7(2) assumes that the persons who are chargeable, and who therefore have the obligation to notify, are "the relevant trustees". This is consistent with s 474 ITA.

19. Notifying chargeability is only required if the trustees (as a single body) are in fact chargeable for the year concerned, and what s 7(9) TMA does is define who, for the purpose of s 7, the relevant trustees are on whom the obligation is placed and it does so by reference to the dates when income arises, a chargeable event gains arises or when chargeable gains accrue (in the strange CGT usage of that word). The effect of the definition in s 7(9) is that a trustee who has ceased to act before the income or gain arises or accrues is not a relevant trustee for the purposes of notifying chargeability for the tax year in which the income arises. But a trustee who is appointed after the date the income or gain arises or accrues is a relevant trustee (of course only if they are appointed before the obligation to notify has arisen).

20. If, as is the case for this trust, there is no income chargeable on the trustees (because it is mandated to the beneficiaries), no chargeable event gains arise and no chargeable gains arise (or accrue) s 7 TMA is of no effect and there was no obligation on anyone to notify.

21. Section 8A(1) TMA allows HMRC to issue a notice to any relevant trustee to complete a tax return, and HMRC may issue a notice to each trustee (if more than one) or to any one or more trustees, but only if they are relevant trustees, and the pool of relevant trustees are those people described in s 7(9) who are relevant trustees in relation to the tax year for which the return is required. It follows that the trustee or trustees to whom the notice to file is in fact issued is or are P.

(b) Assessment

22. There is also a general rule for assessing trustees in s 30AA TMA:

> "(1) Income tax charged on income arising to trustees of a settlement may be assessed and charged on, and in the name of, any one or more of the assessable trustees.
>
> …
>
> (3) In subsection (1) "the assessable trustees" means—
>
> (a) the trustees of the settlement in the tax year in which the income arises, and
>
> (b) any subsequent trustees of the settlement."

23. The definition of assessable trustees is very similar to the description of which relevant trustees may be served with a notice to file. But they need not be the same, as it appears that HMRC have a free choice about which relevant trustee to issue a notice to file to and which assessable trustee to assess.

24. But s 30AA relates only to income tax. Section 62 Taxation of Chargeable Gains Act 1992 is in the same terms (*mutatis mutandis*) but confusingly refers to "relevant trustees" rather than assessable trustees when dealing with assessability.

25. But in this appeal the assessment concerned is of a penalty. While paragraph 18(3) Schedule 55 says that an assessment to a penalty

> "is to be treated for procedural purposes in the same way as an assessment to tax"

which might be apt to cover the identity of the person assessable, that sub-paragraph goes on to say:

> "(except in respect of a matter expressly provided for by this Schedule)".

26. Paragraph 18(1) says it is P who must be assessed. Not only is that an express provision, it is a mandatory one, unlike it seems s 30AA TMA. Thus it is the relevant trustee or trustees who were given the s 8A(1) TMA notice who are to be assessed. This is also consistent with the requirements in s 8A(5) to read relevant references in other parts of TMA (notably s 29) by reference to the identity of the s 8A(1) notice recipient.

(c) Appeals

27. Paragraph 20 Schedule 55 gives a right of appeal to P. It is noticeable that there is no trustee equivalent to paragraph 25 Schedule 55 which has special rules for appeals in the case of partnerships.

(d) Relevant trustees generally

28. But there is a more general rule. Section 107A TMA relevantly says:

> "(1) Subject to the following provisions of this section, anything which for the purposes of this Act is done at any time by or in relation to any one or more of the relevant trustees of a settlement shall be treated for those purposes as done at that time by or in relation to the other or others of those trustees.
>
> (2) Subject to subsection (3) below, where the relevant trustees of a settlement are liable—
>
> (a) to a penalty under … Schedule 55 to the Finance Act 2009 …;
>
> ...
>
> the penalty … may be recovered (but only once) from any one or more of those trustees.
>
> (3) No amount may be recovered by virtue of subsection (2)(a) … above from a person who did not become a relevant trustee until after the relevant time, that is to say—
>
> (a) in relation to—
>
> (i) a penalty under paragraph 4 Schedule 55 to the Finance Act 2009 in respect of a return or other document falling within item 1, 2 or 3 of the Table in paragraph 1 of that Schedule, …
>
> …
>
> the beginning of the penalty date as defined in paragraph 1(4) of that Schedule;

…"

29. "Relevant trustees" in this section has the same meaning as in s 7(9) TMA both because s 7(9) says so, and because s 118(1) TMA applies that definition to the whole of TMA (somewhat unnecessarily, it might be thought).

30. I consider the application of all this law to the facts of this case later.

Grounds of appeal & HMRC's response

31. The grounds of appeal are:

(1) The trustees thought a nil return had been submitted by BDO, their previous accountants, who told Forbes Dawson that they did not receive an agent's copy of any notice to file a return.

(2) Due to the change in agent and ongoing confusion the return was not submitted until after the penalty.

(3) There is no income or capital gains to report and a £1,300 penalty on that basis is particularly severe.

(4) The trustees have no funds to pay as they have no income.

(5) In similar cases HMRC have taken a common sense view which is lacking here.

32. HMRC say in response that:

(1) BDO is a large firm and would be well aware of filing dates. They did not come off record with HMRC until 30 August 2012.

(2) HMRC's records show that someone from BDO phoned HMRC on 2 March 2012 to discuss the penalty notice and were told that a notice to file was sent to the trustees in April 2011.

(3) Even if there was a reasonable excuse still extant in March 2012, the failure was not remedied for 6 months, an unreasonable delay.

(4) Reliance on BDO is not reasonable as it is the appellant's responsibility to deliver the return.

(5) The trustees cannot rely on insufficiency of funds unless the cause was outside their control. The first penalty notice would have alerted them to take control of the situation and file the returns.

(6) Each case must be considered in relation to its own circumstances.

33. HMRC do not address the point about the severity of the penalty in a case where no income or gains are received and returned.

34. In relation to special circumstances HMRC say that they have taken into account grounds of appeal (1), (4) and (5) but say they are not special circumstances. They do not say why they think that.

Discussion

Who were the addressees of the notices?

35. A strange aspect of this case is that nowhere in the papers can I find:

(1) the name of the trustee (or if there is more than one, trustees)

(2) whether there was any change in the trustees in the relevant period (between the start of the tax year and the appeal against the penalties)

(3) which particular trustees were issued with the notice to file or how those notice or notices described the intended recipient

(4) how the recipient of the notices of assessment to penalties were described, whether simply by their name, or their name as trustee of the trust or just as the trustees or even just as the trust, given that is how the HMRC's Return Summary screenshot and the View/Cancel Penalties screenshot show the name of the taxpayer.

36. This all contrasts strongly with the case of a partnership appeal (item 3 in the paragraph 1 Schedule 55 table) where I am invariably given these details in the papers.

Were the notices properly served and in the proper form?

37. Questions therefore arise in my mind about proper service and correctly completed notices. Here I am mindful that "the trustees" (whether one or more separately or jointly) and possibly BDO received the notices of assessment to the penalties and have not put any want of form in issue. But I am also mindful that in *Hart (HM Inspector of Taxes) v Briscoe and another* (1977) 52 TC 53 counsel for the Inspector felt obliged to inform the High Court that the assessment there had been made on the wrong trustees, and the Court (Brightman J) held it to be "an awkward question of jurisdiction" which it resolved by the application of s 114 TMA. I am content to accept that a relevant trustee or the trustees as a body were properly served with the notices of assessment on the penalties, but it would be much more helpful if the information that I found to be lacking were supplied as a matter of course in appeals against assessment on trustees.

38. However whether a relevant trustee received the notice to file is less obvious. The current agent, Forbes Dawson LLP, say that BDO told them they did not get an agent's copy of the notice to file the 2010-11 return. There is an entry in the SA Notes dated 6 June 2011 which says "ADL – Agent re UTR, advised Trust not individual. 11.27". A note of 6 December 2010 says that a 64-8 had been received, so what BDO say and the cryptic entry of 6 June 2011 might suggest that the notice to file was not one addressed to a, or the, trustees or was not received by the trustees.

39. It could be said that the current agents, by relating what they were told by BDO as a ground of appeal, are putting service on the trustees in issue. But HMRC's records, while not setting up a presumption as an electronic communication would, are evidence that a notice was issued to "the trust". In my view it is more likely than not that a notice to file was served on a trustee or the trustees, and that either an agent's copy was

inadvertently not sent to BDO or it was lost in what is a large organisation (or it may be that a notice to file is not copied to an agent even where a 64-8 is in place).

Can these trustees be given a valid notice to file?

40. The previous two paragraphs presuppose that a notice to file can be given to relevant trustees in this case. Earlier in this decision I set out the relevant text of sections 7 and 8A TMA and other relevant law. In its application to this case I consider these sections raise an important question because the definition in s 7(9) ties the identification of a relevant trustee to events which did not apply to this trust in the tax year 2010-11 (and may well not have applied in previous years). Because no income arose to the trustees and no chargeable gains accrued to them in the year there were no trustees who can be identified as being trustees when income arose or subsequently.

41. The question that arises then in my mind is whether the apparent inapplicability of s 7(9) TMA in this particular set of circumstances is deliberate, so that the trustees were not actually legally required to deliver a return in a period where there is no income and no chargeable gain arising or accruing (and thus no requirement to notify chargeability). I recognise that s 8A(1) TMA gives HMRC a discretion about who to issue a notice to file to, and that may be done in cases where there is no requirement to notify chargeability, so long as the return is issued for the purpose in s 8A(1). That subsection includes the purpose of:

> "establishing the amounts in which the … *beneficiaries* … are chargeable to income tax … for a year of assessment, and the amount payable by him by way of income tax for that year" [my emphasis – not simply the trustees]

42. However there is nothing on the trustees tax return under s 8A, the SA 900 (2011), which requires an IIP trust where the income is mandated to the life tenant, as is the case with this one, to give any such information on the return. The return only requires information about beneficiaries where there is a discretionary payment to them.

43. The application of s 7(9) TMA to s 8(1A) can then be seen to give a sensible result if it is construed to have the effect that a notice to file cannot be given to the trustees of an IIP trust with all income mandated to the life tenant and with no chargeable gains. That construction is consistent with what HMRC's website said in 2011[1] about trustee responsibilities:

> "**Notifying HMRC that tax is due**
>
> If you're a trustee and haven't already received a Trust and Estate Tax Return you must notify HMRC when:
>
> - a new trust that will receive income or make chargeable capital gains has been set up

[1] See page on historic HMRC website (last accessed by me on 12 September 2018) at http://webarchive.nationalarchives.gov.uk/20110204053053/http://www.hmrc.gov.uk///trusts/trustee/responsibilities.htm.

- a trust that hasn't been receiving income or making chargeable capital gains starts to do so

Completing and sending back any tax return issued to you

If you receive a tax return or a notice to file a return from HMRC, you have to either fill in a return and send it back, or submit a return online, even if your trust hasn't received any income or made any gains that year. It's important to think about whether HMRC really needs to be told about your trust. To avoid having to complete a tax return unnecessarily it's better to wait until your trust is receiving income or has made any chargeable capital gains."

44. If a chargeable gain arises to the trustees of a such an IIP trust, it will give rise to a tax liability on the trustees, and they must notify chargeability under s 7 TMA by 5 October following the year or face a penalty under Schedule 41 FA 2008. They would then be validly issued with a notice to file.

45. But where there is no such gain, then in my opinion a notice to file cannot be given, and no one can be penalised for failing to deliver one.

Reasonable excuse

46. What follows is on the basis that I am wrong about what I say on the notice to file and that as a result the assessments of penalties are valid and the notices properly given.

47. In my view there is a reasonable excuse for the failure to file the return by 31 January 2012. Reliance had been placed on BDO, a reputable and major firm of accountants. Nothing suggests that BDO had failed to carry out their tasks in the past, and a reasonable body of trustees is entitled to assume that such a firm would carry out what they have been asked to do without a need to check upon them before the deadline, particularly where the return was a nil one.

48. But once a penalty notice had been received by the trustees, alarm bells should have rung, but they didn't. That reasonable excuse cannot exist for longer than a reasonable period after the receipt of the penalty notice, so it does not excuse the failure after 3 months or after 6 months. "Confusion" (as put forward by Forbes Dawson as an excuse) does not make the period a reasonable one.

49. The trustees' agents also say that the trustees have no funds with which to pay the penalties as all income is mandated to the life tenant. Paragraph 23(2)(a) Schedule 55 allows an insufficiency of funds as a reasonable excuse for not filing a return but only if the reason for that insufficiency was outside the trustees' control. The trustees say that had no income and I accept that. But I do not see why that prevented them from delivering a return. There is no suggestion that the reason for the failure to deliver the return was that BDO would not do it unless they were paid. I cannot see how the insufficiency affects the failure to deliver, as distinct from their ability to pay the penalties which is not relevant to the question of reasonable excuse. HMRC's response on this point seems to me to miss the point by a large margin. So there is no reasonable excuse in the case of the daily and 6 month penalties.

Daily penalty

50. But as to the daily penalty there is no SA reminder or SA 326D (or its equivalent for trustees if different) in the papers that is addressed to the trustees, 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)). I therefore cancel that penalty.

6 month penalty

51. As to the 6 month penalty I cancel it as it was issued automatically before the return was received without an officer of HMRC considering to the best of their knowledge and belief what the penalty should be (see *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) (a decision of mine).

Special reduction

52. HMRC have addressed the question whether there were special circumstances, but say there are none. The lack of reasoning to say why the matters they say they took into account means that the decision was flawed in judicial review terms.

53. One important matter they failed to take into account was that this is a life interest trust where all the income is mandated to the beneficiary. Accordingly s 76(1) TMA may have applied. That subsection said in 2010-11[2]:

> "*Protection for certain trustees, agents and receivers*
>
> (1) A trustee who has authorised the receipt of profits arising from trust property by, or by the agent of, the person entitled thereto shall not, if—
>
> (a) that person or agent actually received the profits under that authority, and
>
> (b) the trustee makes a return, as required by section 13 of this Act, of the name, address and profits of that person,
>
> be required to do any other act for the purpose of the assessment of that person to income tax."

54. The papers show that the income (profits) are mandated to the life interest beneficiary and are not received by the trustees. I do not know if a s 13 TMA return had been made. But s 76 does not say that the trustee of a trust within s 76 is not required to make a return. And it is noteworthy that s 77 TMA which generally applies Part 7 of TMA (in which s 76 is found) explicitly excludes s 76 from its ambit. This is no doubt because a life tenant to whom income is mandated is not entitled to capital, including capital gains.

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[2] By paragraph 51(2)(q) Schedule 23 FA 2012, s 76 was repealed, and s 13 was repealed by paragraph 51(2)(a) with effect from 1 April 2012 but with saving provisions for notices issued before then (relevant only to s 13). The replacement provisions are in the Data-gathering Powers (Relevant Data) Regulations 2012 (SI 2012/847 at regulations 24 (settlements) and 11 (income belonging to others), but there is no link between them and nothing to suggest that the effect of s 76 is reproduced. Regulation 24 lists as data within the powers information relating to the settlement in question and income or gains arising to the settlement.

55. HMRC's Trusts Manual (TSEM) says at paragraph 3040:

> "Sometimes there are instructions or arrangements for income to bypass the trustees of an interest in possession (IIP) trust. If trust income passes directly or indirectly to a beneficiary without going via the trustees, there is no statutory basis for charging the trustees to income tax in respect of this income, because the trustees are neither entitled to it nor in receipt of it.
>
> Trustees of interest in possession trusts (IIPs) exclude such income from the Trust and Estate Tax Return."

56. This applies to income, not chargeable gains. This is reflected in the Tax Return Guide for the Trust and Estate Return (SA900) for 2010-11 on page 2:

> "3) **If you are the trustee of an interest in possession trust** (one which is exclusively an interest in possession trust), and:
>
> - …
> - you have mandated all the trust income to the beneficiary(ies), **or**
> - …
>
> then, **if you have made no chargeable disposals**, go straight to Question 19 on page 11.
>
> **If you have made chargeable disposals,** answer Questions 5 and 6 at Step 2 and then Questions 17 to 22."

57. Question 19 is irrelevant to the return of income and gains. The other questions are relevant where there are chargeable gains. It cannot be said then that the return is not relevant to the trustees of an IIP trust where income is mandated to a beneficiary because that income does not, at least in the UK, include capital gains on the disposal of assets. It cannot be said that requiring a return of the trustees of an IIP trust is not within the purpose of s 8A TMA.

58. But that is not the end of the story. §43 explains what HMRC's website said about trustee responsibilities. This guidance suggests that the trustees were unnecessarily completing returns. As an IIP trust where the income is mandated to the life tenant it has no liability to income tax. It has a potential liability to CGT if it makes chargeable gains. Then and only then was it required to notify under s 7 TMA. In my view this was a special circumstance: and it was one that HMRC did not take into account. If they did, they certainly did not say so, let alone give any reasons for rejecting it, and that decision was therefore flawed in judicial review terms. I could therefore have substituted my own decision on special circumstances. I would have done do so, so that, if I am wrong about whether there was a reasonable excuse about the initial penalty and about the other penalties on other grounds, the penalties should be reduced to nil.

59. HMRC say however that they did consider the grounds of appeal in §32(1), (4) and (5) as possible special circumstances, and submitted they were not such circumstances. They gave no reasoning and so the decision was flawed. But I am

unable to say that these grounds do amount to special circumstances and that the HMRC decision was not within the bounds of a reasonable decision.

60. The appellants also say that the penalties were very severe where there was no income to return. This is undoubtedly true, but I am not persuaded without further argument that the Schedule 55 penalty regime is so harsh as to be "plainly unfair", given that there defences such as reasonable excuse and particularly special reduction available.

Observations

61. At §29 I set out the text of s 107A TMA. The terms of subsection (1) support an approach to the question of who was given a notice and who was assessed which is forgiving of errors of form and identity. But I am intrigued by some of the later subsections. Subsection (2) is straightforward. Irrespective of which relevant trustee was assessed to a penalty, recovery, ie collection, of the penalty may be effected from any relevant trustee, even if they were not assessed, so long as there is no double recovery.

Subsection (3) applies only to the paragraph 4 (daily) penalty. A relevant trustee can only be approached to pay a penalty under paragraph 4 if they were a trustee before the date given by paragraph 1(4) as the penalty date. That date in this case is 1 February 2012. I could understand it if the subsection also applied in relation to any of penalties under paragraphs 3 to 6, as the failure that triggers them also takes place on 1 February. But why are paragraph 4 penalties singled out? My speculation is that the drafters of the amendment to section 107A to refer to paragraph 4, which was made by art 10 of the Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order 2011 (SI 2011/702), based the amendment on the (reasonable) assumption that before a paragraph 4 penalty could be imposed a special act of notification to the taxpayer was needed. This speculation of mine was held to be wrong by the Court of Appeal in *Keith Donaldson v HMRC* [2016] EWCA Civ 761, so it appears the drafter of the order was under a misapprehension. It is still odd.

62. 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: 20 September 2018