



**TC06186**

**Appeal number: TC/2017/04187 & 04209**

*CAPITAL GAINS TAX & INCOME TAX – Notice issued under para 1 Sch 36 FA 2008 for information and documents – initial penalty for failure to comply – daily penalties for failure to comply – whether penalties validly issued – whether reasonable excuse for failure to comply – whether compliance before end of daily penalty period – initial penalty quashed – daily penalties reduced.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LAXMI CHOHAN & BHUPATRAI CHOHAN**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE RICHARD THOMAS  
RICHARD LAW**

**Sitting in public at Taylor House, London EC1 on 9 October 2017**

**Mr D R Amin of Amin Patel & Shah Ltd, Accountants for the Appellant**

**Ms Sadia Siddiqui, Litigator HMRC Solicitor's Office, for the Respondents**

## DECISION

1. This was an appeal by Mr & Mrs Chohan (“the appellants”) against initial and daily penalties imposed on them for their failure to each comply with a notice issued to them (“the notices”) under paragraph 1 Schedule 36 Finance Act 2008 (“Schedule 36”).

### Facts

2. The appellants made and delivered tax returns for the year ended 5 April 2015 on 7 October 2015. The returns indicated that chargeable gains had been made, but no computations had been supplied.

3. On 27 September 2016 HMRC informed the appellants and Amin Patel & Shah Ltd (“the accountants”) of their intention to open an enquiry into the returns under s 9A Taxes Management Act 1970 (“TMA”). The letter to the appellants (but not that to the accountants) included a schedule of information and documents HMRC required, primarily relating to disposals of properties, although one of nine items on the Schedule asked for tenancy agreements.

4. On 18 October 2016 HMRC sent a letter to the appellants (copied to the accountants) which constituted a notice under paragraph 1 Schedule 36 requiring the information previously requested and an additional item about income from rents. The deadline for the notices was 19 November 2016. The letter contained a warning about penalties for failure to comply.

5. On 16 November 2016 Mr Dilip Amin, the principal of the accountants, wrote to HMRC to ask for an extension of time of 4 to 6 weeks, saying that he was in the process of replying, but not all the paperwork was to hand.

6. On 21 November Mr Grainger phoned the accountants to discuss the request for an extension but was not able to speak to Mr Amin and asked to leave a message that he wished to talk to Mr Amin. Before us Mr Amin accepted he had received the message.

7. 15 minutes later Mr Grainger phoned the number given by Mrs Chohan and asked to speak to her. He recorded that a male person who was very quiet (and who explained that he was disabled and deaf in one ear) told him she was not there, and told him all their tax affairs were handled by Mr Amin. Mr Grainger left a message asking Mrs Chohan to ring him. It was explained to us by Ms Siddiqui that only Mrs Chohan had given her personal phone number to HMRC.

8. On 22 November Mrs Chohan, who is a pharmacist, returned Mr Grainger’s call. She expressed surprise at being called at home. Mr Grainger explained that he had not received the documents from Mr Amin because he had said they were not all available to him. He asked Mrs Chohan if she knew where the documents were. Mrs Chohan explained that her husband had had a stroke 10 years earlier and was unwell

and asked him not to call her at home, but to deal with Mr Amin, who she said would be in his office on Friday. They had given all documents to Mr Amin.

5 9. On 25 November 2016 Mr Grainger called the accountants and was told Mr Amin was in a meeting. He left a message asking why Mr Amin needed more time to produce the information and documents.

10 10. On 30 November 2016 Mr Grainger sent to each of the appellants a notice of assessment to a penalty of £300 for their failure to supply the information by the deadline, copying the notices to the accountants. The notice reset the deadline for compliance to 6 January 2017, and said that if this was not complied with HMRC may charge further penalties of up to £60 a day from the date of “this penalty notice”.

11. On 12 November 2017 Mr Grainger phoned the accountant asking to talk to Mr Amin as he was considering applying daily penalties. The receptionist said she would pass on the message.

15 12. On 18 January 2017 Mr Grainger sent to each of the appellants a notice of assessment to a penalty of £720 for their failure to supply the information by the reset deadline of 6 January 2017, copying the notices to the accountants. The notices explained that the penalty was £15 a day from 1 December 2016 to 17 January 2017 and reset the deadline for compliance to 19 February 2017, and said that if this was not complied with HMRC may charge yet further penalties of up to £60 a day from the date of “this penalty notice”.

25 13. On 26 January 2017 the accountants appealed against the penalty. Mr Amin added that the notices had been complied with on 16 January and enclosed copies of the information sent then. He also said he had not received the daily penalty notices, and had received them from his clients who themselves had received them on 25 January.

14. On 3 February 2017 HMRC acknowledged the appeal and gave their view of the matter.

15. On 22 February 2017 Mr Amin asked for a review on behalf of the appellants.

30 16. On 20 April HMRC sent the conclusions of their reviews which were to uphold the penalty notices. In the letter the officer explained that she saw the points at issue as whether the £720 penalty was valid and whether the appellants had a reasonable excuse for failing to comply with the information notices.

35 17. In the course of the letter she also considered the initial penalty of £300 and upheld it and also considered the validity of the information notices, even though, as she noted, there was no appeal against them.

18. On 19 May 2017 the appellants notified their appeals to the Tribunal.

19. The matters set out in §§2 to 18 are not in dispute and we find them as fact.

20. There was one disputed matter. Mr Amin maintains the he sent a letter to HMRC with the information that was requested in the notices on 16 January 2017. HMRC say that Mr Grainger received the letter on 27 January. They produced in the bundle a photocopy of the envelope received by HMRC, but it was illegible. On the morning of the hearing they produced a clearer but still illegible copy. In the hearing Ms Siddiqui passed up a copy from which we could see that the envelope was shown as being in the Mount Pleasant Mail Centre on 25 January.

21. Mr Amin produced a witness statement from Mrs Socorina Timudo, his secretary. In this, which was signed and dated 2 October 2017, she said that on 16 January she was given a letter to type by Mr Amin in the case of the Chohans. She typed it, Mr Amin signed it, and it was given back to her to post, which she did on the same day in a local pillar box.

22. She provided a copy of the posting book, which showed that on 16 January a letter was posted to a postcode NE98 1ZZ which was the postcode on Mr Grainger's letters and that it was posted second class. The book did not show the name of the clients. The posting book also contained entries from 9 to 23 January 2017, but no later.

23. We find, given the unchallenged evidence of Mrs Timudo and that of Mr Amin that the letter with documents complying with the notices was posted on 16 January. We do not know why the Mail Centre at Mount Pleasant, which is less than a mile from Mr Amin's offices, did not stamp the envelope until 25 January, but to Londoners it is not surprising.

24. By virtue of s 7 Interpretation Act 1978 ("IA") the letter, which we could see was properly addressed and stamped, would be deemed to have been received by HMRC on 19 January at the latest. But the deeming under s 7 IA is capable of being rebutted by evidence to the contrary. The evidence from HMRC is that the letter was still at Mount Pleasant on 25 January and not received by HMRC until 27 January.

25. We consider the significance of this finding later.

### **Submissions**

26. HMRC accepted that, as this was a penalty appeal, they had the burden of proof.

27. They submitted:

(1) The information and documents listed in the s 9A TMA enquiry letters and the notices were reasonably required for the purposes of determining the appellants' tax positions as regards CGT.

(2) Accordingly the notices are valid and legal.

(3) The appellants failed to comply with the notices by 19 November 2016. Although a request for an extension was made on 16 November, Mr Grainger was unable to speak to Mr Amin to discuss it despite many efforts. The penalties issued on 30 November were valid.

(4) The appellants failed to comply by the new deadline of 6 January 2016, so they became liable to daily penalties. The notice and particularly the period of the penalties was correctly stated in accordance with the law.

5 (5) No reasonable excuse has been put forward for the non-compliance with either deadline.

28. Mr Amin had put as the appellants grounds of appeal:

(1) The information requested by HMRC has been provided in a timely manner

10 (2) Information that was not in the clients' possession was provided in a timely manner

(3) HMRC had not followed due process.

29. In his submission to us Mr Amin developed these points.

30. As to §28(1) he was referring to his letter of 16 January 2017 with its attachments.

15 31. As to §28(2) he said that in his letter of 16 November he was referring to certain documents relating to the purchase in 2001 of a property. The clients did not have these documents and eventually by a stroke of luck the 2001 document was retrieved from Mr Amin's files which had been sent to offsite storage.

20 32. As to §28(3) he referred to Mr Grainger's tactics of phoning his clients, particularly when Mr Chohan was very ill and unable to deal with his own affairs. At this point Ms Siddiqui interjected to point out that Mrs Chohan was a qualified pharmacist and director of a company and there was no suggestion she was unable to assist Mr Amin in finding information.

## **Discussion**

25 *What appeals were before us?*

33. We mention first that Mr Amin applied to include the initial penalties in the appeals. He pointed out that in the Notices of Appeal the amount was shown as "£300 + £420" which was a mistake as it should be "£300 + £720". Ms Siddiqui said HMRC did not oppose this amendment to the matters under appeal.

30 34. We accepted that we could deal with both the initial and daily penalty notices, especially as HMRC had reviewed both, and we gave the appellants permission to appeal to HMRC and so far as necessary waived any formalities so far as notifying the appeals were concerned.

*The initial penalties: was there a failure to comply?*

35. The law on initial penalties for failure to comply with a notice under paragraph 1 Schedule 36 (from here references to a paragraph by number but without more are to that numbered paragraph in Schedule 36) is in paragraph 39:

5                   “39—(1) This paragraph applies to a person who—  
                  (a) fails to comply with an information notice, ...  
                  ...  
                  (2) The person is liable to a penalty of £300.”

10 36. Paragraph 39 contains no information on what constitutes compliance or by when it has to be done. For those we have to go to paragraph 7:

                  “Complying with notices  
                  7—(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—  
                  (a) within such period, and  
15                   (b) at such time, by such means and in such form (if any),  
                  as is reasonably specified or described in the notice.  
                  (2) Where an information notice requires a person to produce a document, it must be produced for inspection—  
                  (a) at a place agreed to by that person and an officer of Revenue and  
20                   Customs, or  
                  (b) at such place as an officer of Revenue and Customs may reasonably specify.  
                  ...”

25 37. The notice specified 19 November 2016 as the time for compliance, and specified that compliance must be by post or email. There is a relevant qualification of the time for compliance in paragraph 44:

30                   “44 A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed.”

38. It is clear that Mr Amin asked for further time: it is equally clear that Mr Grainger did not allow it. We therefore find that the appellants failed to comply with the notices and so are on the face of it liable to a penalty of £300 each.

*The initial penalties: was there a reasonable excuse for the failure to comply?*

35 39. Mr Amin maintains that there is a reasonable excuse for the failures. Paragraph 45 covers this:

“45—(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure ....

(2) For the purposes of this paragraph—

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

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

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

15 40. It is clear from the evidence, particularly that of Mr Grainger’s phone conversations with Mrs Chohan, that the appellants relied on Mr Amin to effect compliance (and indeed everything to do with their tax affairs). The effect of sub-paragraph (2)(b) is to make reliance on Mr Amin capable of being a reasonable excuse if the appellants took reasonable care to avoid the failure.

20 41. Was it reasonable for the appellants to rely on Mr Amin to comply? We consider that it was. The appellants had used Mr Amin for their tax affairs for over 30 years, according to Mr Grainger’s notes of his phone call to Mrs Chohan, and he records her as saying that they had given all their documents to him.

25 42. But by itself that is not enough. By sub-paragraph (2)(c) of paragraph 45 if the reasonable excuse comes to an end then the failure must be remedied without significant delay for it to continue to be a reasonable excuse. There is nothing to suggest that the excuse, reliance on Mr Amin, had ceased before the date for compliance.

43. We therefore consider that liability to the penalty under paragraph 39 did not arise in the case of either appellant.

30 *The daily penalties: was there a failure to comply?*

44. The law on daily penalties for failure to comply with a notice under paragraph 1 Schedule 36 is in paragraph 40:

35 “(1) This paragraph applies if the failure ... mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure ...

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure ... continues.”

40 45. The first question is when was the paragraph 39 penalty imposed? It was on 30 November 2016. On our findings the failure continued to 27 January 2017, and on no basis could it have been before 16 January 2017. The failure therefore continued after

30 November 2016. On the face of it the appellants were liable to a daily penalty chargeable for each day starting with 1 December and ending on the earlier of the date specified in the penalty assessment or the date the failure ceases through compliance with the notice. The notices imposed penalties for 48 days, from 1 December to 17  
5 January, which is 48 days, of £15 a day. In our view these penalties were correctly imposed.

*The daily penalties: was there a reasonable excuse for the failure to comply?*

46. Here we think the position is different. Shortly after 30 November 2016 the appellants will each have received an initial penalty assessment expressly imposed for  
10 the appellants', and therefore Mr Amin's, failure to comply with the notices. At that stage it is not sufficient for the appellants to say that they relied on Mr Amin to do everything – they (or at least Mrs Chohan) should have done something positive to find out why they were issued with a penalty, what Mr Amin was doing about it and to give him instructions or any further information that he needed. Reliance on Mr  
15 Amin ceased to be a reasonable excuse for the failure to comply by the new deadline Mr Grainger had imposed of 6 January 2017.

47. Mr Amin suggested that his inability on behalf of the appellants to find certain historic records until his storage company had found them was a reasonable excuse. We are prepared to accept that this particular circumstance would have amounted to a  
20 reasonable excuse for the failure to comply, but only if this particular item had been the only item in the notices. Paragraph 45 does not allow a picking and choosing to determine whether one or more requests out of a larger total have been complied with and to do some sort of weighing exercise: it is all or nothing. That doesn't mean that the fact that there was a reasonable excuse for one or more elements cannot be taken  
25 into account at all, as will be seen below.

48. It follows that in terms of paragraph 45 the appellants had no reasonable excuse for their failure to comply with the whole of the notices.

49. But before we decide what effect on the penalty, if any, this partial reasonable excuse has, there are some other matters we should look at.

30 *The penalties: other matters*

50. We consider that the assessments were valid in the sense that they did all they were required to do by the provisions of paragraph 46.

51. Mr Amin raised an allegation that HMRC had not followed "due process". He elaborated on that by saying that Mr Grainger should have attended his offices to  
35 discuss the case and should not have phoned Mrs Chohan. This is not something which it is in our jurisdiction to consider. Any complaints about Mr Grainger's conduct must be addressed to HMRC in the first instance as a complaint, not to this Tribunal.



52. In the hearing Mr Amin also raised Mr Chohan's illness as an excuse. We had no medical evidence about this, nor was it clear to us why Mrs Chohan was not in a position to do anything that Mr Chohan was unable to do.

53. We now consider our powers in relation to the appeals.

5 *Our powers and our exercise of them - liability*

54. Under paragraph 48(3), in the case of an appeal against a penalty notice under paragraph 47(a) (liability) we can either quash or confirm the decisions of HMRC. In the case of the initial penalties we quash HMRC's decisions. In the case of the daily penalties we confirm their decision that the appellants were each liable.

10 *Our powers and our exercise of them - amount*

55. Under paragraph 48(4) in the case of an appeal against a penalty notice under paragraph 47(b) (amount of the penalty) we can either confirm the decision of HMRC or substitute our own that was within the power of HMRC to make. This is only relevant to the daily penalties.

15 56. There are four matters which we think affect this part of our powers.

57. Is £15 a day a reasonable amount? We think it is, being only 25% of the maximum and in accordance with HMRC's policy.

58. Should the daily penalties be reduced on account of the alleged compliance by the appellants on 16 or 17 January, given that the daily penalties run to 17 January?  
20 We have found that Mr Amin posted the letter containing all the information and documents requested on 16 January but that it did not reach Mr Grainger until the 27 January.

59. Paragraph 7 says that

25 "Where a person is required by an information notice to provide information or produce a document, the person must do so within such period ..."

60. In our view "provide" and "produce", while not common words in situations such as this, must have the same meaning as the more familiar "deliver" or "serve". Provision and production must involve not merely transmission but receipt. There is  
30 therefore no warrant to reduce the daily penalty on this account.

61. Should both of the appellants have been issued with a notice? It is not clear to us whether what was asked of each appellant was the production of the same documents and provision of the same information as is asked from the other. The notice requests, after asking for details of the properties and transactions in them  
35 which were reflected on "your" return, the addresses of all properties "you owned" and "if any of these properties are jointly owned" the name and address of the co-owner.

62. The documents and information that were supplied by Mr Amin in January 2017 show only jointly owned properties and there is no suggestion in Mr Amin's covering letter that there were properties not jointly owned by the appellants.

5 63. We take into account that it turns out that the notices were in fact (though this may not have been known to Mr Grainger) asking for identical information and that had this been a partnership then only one notice would have been issued to the nominated partner. As a result we reduce the rate of daily penalty to £7.50.

*The "old" document*

10 64. Finally we mention that in the course of the hearing we noted that the document that Mr Amin had to retrieve from storage (something which we have held gave the appellants a reasonable excuse for not complying with the notice so far as it related to that document) related to the purchase of a property in 2001. Paragraph 20 says:

*"Old documents*

15 20 An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer."

20 65. Ms Siddiqui was unable to say if Mr Grainger was an "authorised officer". From Judge Thomas's experience of dealing with approval applications under paragraph 3 which must also be approved by an authorised officer, we think it unlikely that Mr Grainger was authorised, as that officer is usually a manager of, or senior in grade to, the investigating officer.

25 66. We therefore think it likely that the request for any document relating to a purchase in 2001 was not a valid request, even though Mr Grainger may not have known that.

30 67. However the question whether the validity of an information notice may be questioned in an appeal against penalties, and where no appeal was made against the information notice, was considered by the Upper Tribunal in *Birkett v HMRC* [2017] UKUT 89 (TCC) (Nugee J and Judge Greenbank). In that case the validity of the notices was questioned on the grounds of legitimate expectation and the Human Rights Act in an appeal against penalties for non-compliance with the notice. That is not the case here.

35 68. But in *PML Accounting Ltd v Commissioners for Her Majesty's Revenue and Customs* [2017] EWHC 733 (Admin) ("*PML*"), Sir Ross Cranston, sitting as a judge of the High Court, held that an appeal against penalties could not involve an enquiry into the validity of the notice of any grounds. There this tribunal had held that as the notices were invalid because they were not for the purposes of checking the recipient's tax position, the penalties must too be invalid.

40 69. These cases are binding on us and as a result of, in particular, *PML*, we cannot seek to impugn the validity of a notice as a basis for allowing an appeal against the

penalties for non-compliance with it. It follows that we cannot consider whether HMRC were right to say, as they did in both the review of the appeals against the penalties and in their submissions to the Tribunal, that the information notice was valid.

5 70. In this case, though, it was not the whole notice that falls foul of a relevant provision of Schedule 36, only one item out of ten, the other nine being valid requests not affected by paragraph 20. But we think the principle set out in *PML*, that the validity of a notice (and by extension any part of it) may only be challenged on an appeal against the notice still applies.

10 71. Had the appellants, or more likely Mr Amin, realised that one item was asking for “old” documents he could have appealed against the notice so far as related to that particular item.

15 72. We realise that it is unlikely that Mr Amin would have known that Mr Grainger was not an authorised officer and would have no reason to know that or ability to find out except by asking HMRC, and so would not have been in a position to make an appeal on the ground that paragraph 20 applied. But again that does not, it seems to us, affect the principle in *PML* that we could not have intervened on this matter unless we had given permission for a late appeal against the notice to be made. No such application was made even after we had expressed our (provisional) views on the point, and given the circumstances in which the point was raised we did not think it appropriate to suggest of our own motion that permission for a late appeal could be applied for, especially as it is clear that the provisions of s 49 TMA apply to Schedule 20 36 FA 2008 appeals.

25 73. We have asked ourselves what we would have done had there been an appeal against the notices on the grounds that paragraph 20 applied to only one item out of 10 and in particular whether the invalidity of this particular request would have so infected the rest of the notices as to render the whole notice invalid. We do not think it would. We have noted the decision of this Tribunal in *The Barty Party Company Ltd v HMRC* [2017] UKFTT 697 (TC) (Judge Rachel Short and Mr William Haarer) (“*Barty*”). In that decision a notice issued for the purpose of checking the VAT position of the appellant sought documents and information covering a period going back more than four but less than six years old. The Tribunal held that because a VAT assessment could only be made up to four years back (in the absence of fraud etc) the older information was not reasonably required for the purpose for which the notice was issued. As a result the tribunal quashed the notice as a whole. 30 35

74. We do not think the position here is comparable. The documents required were for the purpose of checking the appellants’ tax position for 2014-15 and were asked for in the course of a s 9A TMA enquiry. If additional tax became due it could be charged in an amendment to the returns and self-assessment, with no possible bar due to assessing time limits. And we do not know why in *Barty* the tribunal quashed the whole notice and not just the “old” parts. 40

75. Our conclusion on the question of the “old” document is that, even though we cannot rule on the validity of the notice in the absence of an appeal against it, and even though there was no reasonable excuse for compliance with the notice as a whole, we can reflect the reasonable excuse for the non-compliance with one part by exercising our power under paragraph 48(4) to reduce the penalty and we do so by reducing the daily penalty amount by 10%.

76. As a result the daily penalty becomes £6.75 a day, or £243 on each appellant.

*Final observation*

77. We add finally that if Mr Amin had devoted his energy to explaining in a simple phone call to Mr Grainger why he could not comply with the notice, instead of attacking Mr Grainger’s approach to the case, the penalties may well have been avoided.

**Summary of decisions**

78. In relation to Mrs Laxmi Chohan:

- (1) We quash the initial penalty of £300, so that no penalty is due
- (2) We substitute for HMRC’s decision on daily penalties a decision that the amount is £243 and not £720.

79. In relation to Mr Bhupatrai Chohan:

- (1) We quash the initial penalty of £300, so that no penalty is due
- (2) We substitute for HMRC’s decision on daily penalties a decision that the amount is £243 and not £720.

80. 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: 24 OCTOBER 2017**