



**TC06975**

**Appeal number: TC/2018/05306**

*CAPITAL GAINS TAX – late payment penalties – Schedule 56 to FA 2009 – whether s 280 TCGA on ‘Consideration payable by instalments’ applies – whether Tribunal has jurisdiction over HMRC’s decision – whether delays in replying to application for s 280 TCGA treatment gave rise to a reasonable excuse at each penalty date – whether reasonable care taken in reliance on a third party – whether special circumstances – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PHILIP FRIEL**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE HEIDI POON  
JANET WILKINS**

**Sitting in public at Eagle Building, Glasgow on 18 January 2019**

**Julie Young, of Gerber, Landa & Gee, Chartered Accountants for the Appellant**

**Matthew Mason, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. Mr Friel ('the appellant') appeals against the penalties imposed by the respondents ('HMRC') under Schedule 56 to the Finance Act 2009 ('Sch 56') in relation to the late payments of his capital gains tax for the year 2013-14.
2. The total sum of Sch 56 penalties imposed is £9,869.

### Relevant legislation

3. The payment due dates for tax liabilities are provided under s 59B of the Taxes Management Act 1979 ('TMA'), and the due date for CGT is under sub-s 59B(4):

'In any other case, the difference shall be payable or repayable on or before the 31<sup>st</sup> January next following the year of assessment.'

4. Section 280 of Taxation of Chargeable Gains Act 1992 ('TCGA') provides for the payment of CGT by instalments:

#### **'280 Consideration payable by instalments**

If the consideration, or part of the consideration, taken into account in the computation of the gain is payable by instalments over a period beginning not earlier than the time when the disposal is made, being a period exceeding 18 months, then, at the option of the person making the disposal, the tax on a chargeable gain accruing on the disposal may be paid by such instalments as the Board may allow over a period not exceeding 8 years and ending not later than the time at which the last of the first-mentioned instalments is payable.'

5. In relation to the penalties imposed under Sch 56, special reduction is provided under para 9 whereby '[i]f HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule'.

6. Paragraph 13 provides that a taxpayer may appeal against a decision of HMRC and makes a distinction between:

'(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'.

7. Paragraph 15 of Sch 56 provides for the Tribunal's jurisdiction:

'(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may –

(a) affirm HMRC's decision, or

(b) substitute for HMRC decision with another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9 –

(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 of judicial review.'

8. Paragraph 16(1) of Sch 56 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on an appeal, the Tribunal) that there is a reasonable excuse for the failure. Under para 16(2), it is provided:

'(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 facts**

### *The penalties under appeal*

9. Mr Friel is a dentist, and built up a practice that was incorporated as 'Philip Friel Dentist Limited' ('the Company') during the tax year 2013-14. A capital gains tax ('CGT') liability crystallised on incorporating his dental practice business.

10. The quantum of the CGT liability was £99,910, and that is not a matter in dispute. The due date for the CGT payment was 31 January 2015.

11. It is common ground that the sum of £16,660 (or £16,702.20 according to Ms Young's schedule provided at the hearing) was paid by the due date, and the balance of £83,250 had been paid after the due date by half-yearly instalments, with the last payment being made on 1 February 2018.

12. Consequently, the following penalties have been imposed in relation to the late payment of the capital gains tax arising in the year 2013-14. The penalties were all calculated at 5% of the balance of unpaid tax at the relevant times:

(1) 30-day late payment penalty of £4,160 by notice dated 17 March 2015;

(2) 6-month late payment penalty of £3,328 by notice dated 14 August 2015;

(3) 12-month late payment penalty of £2,381 by notice dated 23 February 2016.

*Correspondence between agent and HMRC*

13. On 3 February 2015, Mr Friel's accountants, Gerber & Landa Gee ('Gerber') wrote to HMRC. The full body of text reads as follows:

'We filed our client's 2014 personal tax return on 30 January 2015.

Our client's return includes a capital gain arising from the disposal, by way of goodwill, of his interest in his practice to a newly-formed limited company of which he is the principal shareholder. Since it is anticipated, at future profit levels, that this company will only be in a position to settle the consideration over a five to seven year period, we are writing to request your agreement to settlement of the [CGT] ... over a three-year period on a six-monthly basis, the first instalment of ... £16,660 will be met now, with the balance settled in 5 further instalments of £16,650 each, commencing 31 July 2015. It is accepted that interest will arise on sums due.

We look forward to hearing from you in due course.'

14. On 8 May 2015, HMRC wrote to 'apologise for the delay in replying' to Gerber's letter of 3 February 2015. The letter requested information as follows:

'Before we can consider whether payment of the Capital Gains tax by instalments is appropriate I will need full details of the consideration received and its exact nature.

The dates that it is to be paid and whether it is ascertainable or unascertainable.'

15. HMRC's letter of 8 May 2015 continued by referring Gerber to 'Capital Gains manual at CG14850 onwards and in particular CG14910', and asked that Gerber should confirm that the disposal has met all relevant conditions.

16. Gerber claimed that HMRC's letter of 8 May 2015 was only received on 26 May 2015. Another month passed before Gerber replied on 2 July 2015, giving the requested details as follows:

'No cash consideration was received at the time of the transfer of the business to the limited company as the sole proprietor business had at the time of transfer net current liabilities which included bank indebtedness of 335k and HP liabilities in excess of 100k.

As a consequence of the transfer a new asset of goodwill was recorded in the company's books and a corresponding credit of a vendor (director) loan was also created. The HP creditors were novated and the bank loan was repaid by the sole proprietor business and anew business term loan for a similar amount created, the remaining net assets of the business were transferred to vendor (director) loan. Consequently the sums due will only be payable once the company earns profits after tax and after servicing and meeting the loan conditions of its creditors. For this reason the request for instalment treatment under TCGA S280 has been made.'

17. On 8 September 2015, Gerber wrote to appeal against the late payment penalty notice issued of 14 August 2015 in the sum of £3,328.

18. On 22 December 2015, Gerber wrote again in relation to the Self-Assessment Statement issued on 26 November 2015, which stated the outstanding tax balance as £76,008 (inclusive of interest charge and a minor credit adjustment). Gerber reiterated the request for instalment treatment under s 280 TCGA.

19. By letter dated 24 December 2015 to Gerber, HMRC Inspector Vaughan refused the request for s 280 TCGA treatment with the following reason:

‘Based on the information given ... the amount of the consideration received for the goodwill was credited in full to your clients (sic) directors loan account. HMRC’s view is that such amounts are effectively treated as a full cash payment. See CG14910 and CG65720 in our Capital Gains Tax manual.’

20. Inspector Vaughan concluded therefore that the conditions for an instalment arrangement under s 280 TCGA were not met. She continued by stating that she had ‘referred both of [Gerber’s] letters 3 February and 2 July 2015 back to Debt Management to consider a normal time to pay arrangement’.

#### *From Self-Assessment Notes (‘SA Notes’)*

21. The following entries from Mr Friel’s SA Notes maintained by HMRC are relevant to our consideration:

(1) 18 February 2015: agent called to say letter sent in regarding payment by instalment; telephone number given for Time-to-Pay (‘TTP’)

(2) 18 February 2015: agent called asking if debt can be put on hold until the letter re TTP has been dealt with; letter only sent 3/2/15; timescales showing 9/4/15 for a reply; advise to try ttp again to see if they can hold legal action.

(3) 20 March 2015: letter from agent dated 3/2/15 received; 17/3/15 requesting TTP on Capital Gains over a 3yr period on a 6 monthly basis. Letter faxed to Wearside Technical Team for review.

(4) 26 March 2015, and 27 March 2015 – Agent phoned re letter of 3/2/15.

(5) 20 April 2015: claim from agent to pay CGT by instalments sent to Bootle for ruling.

(6) 5 May 2015: submission returned with instruction to advise agent to provide full details of disposal consideration; letter sent on 6 May 2015.

(7) 6 August 2015: agent’s reply received (date of receipt 8 July 2015); re-directed to ‘Band O’ as relates to CGT.

#### **The appellant’s case**

22. On behalf of the appellant, Ms Young made the following oral submissions:

(1) Mr Friel had a reasonable excuse for not paying his CGT on time. It was reasonable for him to expect that he satisfied the conditions in s 280 TCGA to

settle his liability by instalments. Another client ‘in a very similar situation’ was granted s 280 relief. To refuse Mr Friel’s application shows ‘inconsistency in HMRC’s decision making’.

(2) There were long and significant delays in HMRC’s decision, which was dated 24 December 2015 and only received on 5 January 2016; by then two of the three penalties had been imposed.

(3) The third penalty was issued during the period when Gerber tried to discuss the reasons for refusal with Inspector Vaughan, but without success. Mr Friel ‘cannot be blamed for these delays’ and has made ‘his suggested six monthly payments in good faith’.

23. On 20 June 2018, Ms Young wrote to HMRC detailing the grounds of appeal against the penalties under the following headings:

(1) ‘The Original Point of Contention’ – Gerber ‘have not had sufficient opportunity to argue that the provisions of [s 280 TCGA] are correctly available to Mr Friel’. Enclosing the pages of Balance Sheet and Notes to the Accounts for the Company for the year ended 31 July 2015, Ms Young highlighted the movement in the Director’s loan account from £1,082,921 (year ended 31 July 2014) to £877,057 (year ended 31 July 2015).

(2) ‘Reasonable Excuse’ –that ‘there have been long and significant delays in HMRC dealing with this whole matter’:

‘If HMRC had answered our original request within 30 days, our client may have been able to make alternative arrangements to make payment of the relevant tax and thus avoid any of the penalties which have now been imposed. We consider your delay to be the main factor in resolving this issue and therefore is a reasonable excuse for the late payment.’

24. At the hearing, Ms Young continued to maintain that HMRC were wrong in their decision to refuse the s 280 TCGA treatment. She stated that the Company simply did not have enough cash to pay for the disposal consideration, as reflected by the balance on the Director’s loan account at year ends 31 July 2014 and 2015. The movement in the Director’s loan balance was reflective that the Company could only repay the Director’s loan account by instalments, as post-tax profits began to accrue.

### **HMRC’s case**

25. HMRC’s review conclusion decision in relation to the penalty appeal was dated 18 July 2018, and upheld the penalties for the following reasons:

(1) Under s 59B of the Taxes Management Act 1970 (‘TMA’), Mr Friel was required to pay his liability for the year ended 5 April 2014 by 31 January 2015. The tax was not paid in full until 1 February 2018.

(2) The ground of appeal that another client had received s 280 TCGA treatment is not valid, since the refusal decision of 24 December 2015 can neither be referred for independent review nor appealed to the Tribunal.

(3) HMRC had considered the factors for special reduction as follows: (a) agent advised that s 280 TCGA applies; (b) request to pay by instalments since 3 February 2015; (c) HMRC's delay in replying to the request.

## Discussion

26. The material facts in relation to the imposition of the late payment penalties are not in dispute. Parties are agreed on the sum of the CGT liability; the dates of the instalment payments; the balance of unpaid tax at each penalty date; and the rate of 5% whereby the penalties have been calculated.

27. It follows therefore that there is a *prime facie* case for the late payment penalties to be imposed. We now turn to consider the appellant's grounds of appeal in turn. As there is no dispute as to the penalty calculations, we treat the appeal as brought under para 13(1) of Sch 56 against HMRC's decision that a penalty is payable by Mr Friel.

### *The first ground: HMRC's decision in relation to s 280 TCGA*

28. Gerber continues to hold the view that the instalment treatment under s 280 TCGA should be accorded to Mr Friel's disposal proceeds. This point of contention was elaborated in great detail by Ms Young in the appeal letter to HMRC dated 20 June 2018. It was a point which she continued to emphasise at the hearing, also making the point that HMRC had been inconsistent in treating Mr Friel's case differently from another client's with apparently similar factual matrix.

29. Section 280 TCGA treatment is by HMRC's discretion; the statute makes it clear that upon certain conditions having obtained, 'the Board *may* allow' the consideration as payable by instalments. In Mr Friel's case, HMRC have not exercised their discretion to allow a s 280 TCGA treatment of the consideration.

30. In the absence of such a discretion being exercised, the default position prevails; that is to treat the capital gains tax arising from the chargeable event as referable to the full sum of consideration and payable in full on the normal due date of 31 January.

31. There is no statutory right of appeal against a decision by HMRC in relation to s 280 TCGA. The absence of an appeal right is entirely consistent with the general principle that the Tribunal has no means to arrogate to itself a judicial review function in relation to HMRC's exercise of a discretionary power without express provision by the statute: House of Lords' decision in *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22, and the High Court decision in *Customs and Excise Comrs v National Westminster Bank plc* [2003] STC 1072.

32. It is equally clear that the Tribunal cannot assume jurisdiction in a judicial review sense by applying some other principle of law such as legitimate expectations: *Oxfam v Revenue and Customs Comrs* [2010] STC 686.

33. The first ground of appeal pertaining to the 'incorrectness' or 'inconsistency' of HMRC's decision to refuse to exercise their discretion to allow deferment of the CGT

under s 280 TCGA is not a ground over which the Tribunal has jurisdiction to consider, and we must dismiss.

*The second ground: whether reasonable excuse due to delay in reply*

34. This ground is staked on the considerable delay on HMRC's part in replying to Gerber's letter sent on 3 February 2015. HMRC's decision letter on s 280 TCGA treatment was dated 24 December 2015, and received by Gerber on 5 January 2016.

35. Ms Young submitted that the lateness of the final reply by HMRC meant that 'the damage was already done', at least in respect of the first two penalties. Ms Young focused on the timing of HMRC's refusal decision of 24 December 2015 as the ultimate reference point, and considered the significant delay by HMRC in replying to Gerber's letter of 3 February 2015 as giving rise to a reasonable excuse.

36. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse is 'a matter to be considered in the light of all the circumstances of the particular case' (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

37. The test whether there is a reasonable excuse is enunciated in the following terms by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) at [71]:

'In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times ...'

38. Similarly, in *Barrett v HMRC* [2015] UKFTT 329 (TC) ('*Barrett*'), the test of reasonable excuse applicable to a penalty is stated at [154] as follows:

'The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.'

39. A penalty is triggered by a default, and for the penalty to be cancelled on ground of reasonable excuse, the Tribunal has to be able to establish some form of direct causation between the excuse given and the default. In other words, we must be able to find that due to X (the excuse), the taxpayer has failed to do Y (the default).

40. We consider that there are two stages in establishing 'reasonable excuse'. The first stage is to find causation between the excuse and the default. If causation is established, then the second stage of the test is to consider whether the excuse that has caused the default is nevertheless 'reasonable' by applying the test of reasonableness.



41. The thrust of the argument for reasonable excuse as presented for the appellant is to say: due to HMRC's delay in replying to Gerber's letter of 3 February 2015 (the excuse), the appellant has failed to pay his tax on time (the default).

42. To establish if causation existed between the delays of HMRC's reply and the defaults, we need to consider the relevant circumstances for each default. To that end, we make findings of fact as follows before we consider causation at each penalty date.

(1) The date of Gerber's letter to HMRC to request s 280 TCGA treatment was 3 February 2015, which was after the due date of 31 January 2015 for the payment of the CGT liability.

(2) The chargeable event took place in the tax year 2013-14, which meant that by 5 April 2014, the appellant and his agent would have the knowledge that a CGT liability would be due in January 2015. There was an intervening period of nearly ten months from 5 April 2014 to 31 January 2015 in which clearance from HMRC could have been sought in advance of the payment due date.

(3) From the schedules of Balance Sheet and Notes to the Accounts of the Company for the year end 31 July 2015, we infer from the comparative columns of figures for the year ended 31 July 2014 displayed side by side that the first set of accounts for the Company would have been drawn up for the year ended 31 July 2014, which gave the date of incorporation as 1 August 2013.

(4) From the date of incorporation, being the date of the chargeable event, to the date CGT was due on 31 January 2015, there was a period of 18 months. The legal structure of the transaction would have been implemented by the date of incorporation to enable the consideration to be ascertained along with the method of payment of that consideration for confirmation to be sought from HMRC as regards whether s 280 TCGA treatment would be accorded.

(5) Turning to the content of Gerber's letter dated 3 February 2015 (see §13), the absence of any specific statutory provision being referred to meant that the letter was treated as a TTP request in the first instance. It went to Debt Management for consideration, and all the follow-up phone calls by Gerber confirmed that internally HMRC treated the letter as a normal Time-to-Pay application, (see SA Notes entries at §21).

(6) It was not until 20 March 2015 that the letter was faxed to Wearside Technical Team for review. There followed the letter of 8 May 2015 in which the HMRC requested further information and referred Gerber to specific sections of the Capital Gains Tax manuals.

(7) Gerber replied on 2 July 2015 to provide the requested details in support of the s 280 TCGA treatment. On 24 December 2015, Inspector Vaughan's decision letter was issued.

*(a) The first penalty date on 2 March 2015*

43. The CGT liability was due on 31 January 2015, and the first penalty date was 2 March 2015, being '30 days after the date specified in section 59B (3) or (4) of TMA 1970 as the date by which the amount must be paid' (sub-para 1(5) of Sch 56).

44. Gerber's letter was dated 3 February 2015, and by the time the letter was received by HMRC, there would be less than 30 days before the penalty date of 2 March 2015. Regardless of any subsequent delays, we are unable to find any causal link between the default and the alleged delay at the juncture of the first penalty date. We so conclude because there was no unreasonable delay that could be established in not having replied to Gerber's letter dated 3 February 2015 by 2 March 2015.

*(b) The second penalty date on 31 July 2015*

45. The cause for the second period of delay from 2 March 2015 to 31 July 2015, in our view, was far from being one-sided. We are critical of the content of Gerber's letter of 3 February 2015 in relation to its intended purpose. The letter was deficient in two significant respects which directly contributed to the delay in this period.

46. First, the letter of 3 February 2015 (§13) failed to specify the statutory provision of s 280 TCGA treatment in the body of text. The omission of this reference resulted in the letter being treated as a *normal* TTP application, and led it to be referred to Debt Management for consideration in the first instance. It was in March 2015 that the TTP team realised that the request involved a technical issue that required a ruling in priority over the normal TTP procedure. The realisation resulted in the letter being faxed to the Technical Team on 20 March 2015 for a ruling.

47. Secondly, the letter of 3 February 2015 failed to disclose sufficient details for a ruling to be made by the Technical Team. Further delay ensued, whereby HMRC needed to write on 8 May 2015 for particulars before reaching a decision. Nearly two months lapsed before Gerber replied on 2 July 2015. Even if the date of receipt of HMRC's letter was reckoned as 26 May 2015, there was over a month's delay in furnishing a reply to HMRC's letter. By the time HMRC received Gerber's July letter with the necessary information, which would require consideration before a decision was made, the second penalty date of 31 July 2015 would be less than 4 weeks away.

48. The citation of the specific statutory provision relied on, and the provision of information to support the claim that the necessary conditions under s 280 TCGA were met, would be, in our view, the minimum prerequisite in obtaining a timely decision from HMRC. Whilst Ms Young produced pages of the Financial Statement of the Company highlighting the Director's loan account balances in support of the penalty appeal made to HMRC in June 2018, it is peculiar that no such details were deemed to be necessary for enclosure when requesting s 280 TCCGA treatment.

49. In these circumstances, we are unable to establish a causal link between the delay in HMRC's reply in the second penalty period and the default on 31 July 2015.

*(c) The third penalty date on 31 January 2016*

50. The date of HMRC's decision was 24 December 2015, which was received by Gerber on 5 January 2016. For HMRC, Mr Mason argued that the decision was communicated in time for action to be taken to avoid the default by 31 January 2016, but somehow the appellant had decided to stick to the payment schedule regardless.

51. For the appellant, Ms Young argued that the third penalty was issued during the period when Gerber tried to discuss the reasons for refusal with Inspector Vaughan, but without success. For unknown reasons, Gerber could not get hold of Inspector Vaughan. In Ms Young's submissions, the failure to get hold of Inspector Vaughan to discuss the matter in the post-decision period somehow gave rise to a reasonable excuse for the appellant's default on 31 January 2016, notwithstanding the decision of refusal having been communicated.

52. We cannot see any logical basis for Ms Young's argument. The decision by the Board of HMRC on s 280 TCGA treatment is by discretion that is not open to review or appeal. As a professional firm of chartered accountants and tax advisers, Gerber should know the limits in the scope that HMRC's decision in this respect could be further contended.

53. In the presence of a decision to refuse s 280 TCGA treatment, if Mr Friel was intent to avoid the default on 31 January 2016, it would have been prudent for him to act in accordance with HMRC's decision that had been communicated.

54. In these circumstances, we are unable to establish the necessary causal link between HMRC's reply and the default on 31 January 2016 to allow the penalty to be discharged on ground of reasonable excuse.

55. In the absence of causation between the excuse and the default for each penalty period, it is unnecessary for us to consider if the excuse was 'reasonable'. For reasons set out in relation to the third ground of appeal, we are firmly of the view that even if we had found causation between the excuse and the default, the excuse would not have met the standard of reasonableness to amount to a reasonable excuse.

*The third ground: whether 'reasonable care' taken in reliance on a third party*

56. The only other possible argument on reasonable excuse, which obviously is not advanced by the agent, is that Mr Friel had relied on his agent, and that reliance caused him to fail in making the CGT payment on time. Paragraph 16(2)(b) of Sch 56 provides that:

'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.'

57. As regards the extent any reliance on an accountant can amount to being a 'reasonable excuse' (in the context of whether 'reasonable care' has been taken by the taxpayer), we agree with Judge Berner's view in *Barrett* at [161]:

'The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one

set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.’

58. We do not have any pleading or representations from Mr Friel (or Gerber for that matter) that the appellant’s failure to pay the full CGT on time was due to his reliance on a third party, and that he had a reasonable excuse for that reliance. We consider this possible ground nevertheless for completeness.

59. We are of the view that incorporating a business was a significant decision that Mr Friel would have undertaken only after careful deliberation of the financial and tax consequences. The CGT arising on the transfer of the business and its payment due date would have been fully intimated to Mr Friel by his adviser.

60. As highlighted earlier, s 280 TCGA treatment is by the discretion of the Board. The default position is that the full CGT is payable on 31 January 2015. No presumption can be, or should be made, on the part of the taxpayer that such discretion would necessarily be exercised in his favour.

61. To leave the first mooted of the request for s 280 TCGA treatment till *after* the due date of the CGT liability is not what a responsible taxpayer, conscious of and intending to comply with his obligations regarding tax, would have done.

62. From our findings of fact, the date of incorporation was 1 August 2013. There was a period of 18 months before the normal due date of CGT. That period of time would have been sufficient for clearance from HMRC to be sought conclusively. The structure of the business transfer, and the manner in which the consideration would be met by the transferee, would have been established by Mr Friel and his adviser on the date of incorporation. It would have been prudent for the clearance procedure as regards s 280 TCGA treatment to commence soon after 1 August 2013, even if the figures for accounting purposes remained to be finalised.

63. Throughout the course of dealing with HMRC, there would appear to be some kind of presumption that s 280 TCGA treatment was not in doubt. The content of Gerber’s letter of 3 February 2015 served more the purpose of a notification that the appellant would settle his CGT according to such a schedule, than a request for clearance from HMRC that s 280 TCGA treatment be permitted.

64. It seems to us this presumption had led to the blatant lateness in requesting s 280 TCGA treatment until after the due date of 31 January 2015, and the unmerited latitude in the paucity of information being furnished to support such a request.

65. An HMRC officer makes a decision in relation to s 280 TCGA treatment with reference to HMRC’s internal manuals, which are publicly available on the official website due to the Freedom of Information Act 2000. An internet search with the prompt of ‘s 280 TCGA’ yields the first two references as: SAM80072 and CG14910.

66. Under the Self-Assessment Manual 80072, it is stated that:

‘Arrangements for collecting payment by statutory instalments are handled by the office with processing responsibility. When a request to

pay by statutory instalments is received, the office with technical responsibility is asked to

- Confirm that the statutory instalment provisions apply, and
- Say what payments are expected and the statutory due dates.’

67. For the purposes of this appeal, a pertinent excerpt from CG14910 is:

‘You should distinguish between cases where the consideration is payable by instalments and those where the consideration takes the form of a new asset or assets which are then disposed of in stages. An example would be where the asset is sold for an issue of debentures which are redeemable at six-monthly intervals. Instalments are not appropriate in this type of case because the full consideration, the debentures, has been received. See CG15020 where the vendor has made a loan to the purchaser.’

68. Following the lead as suggested in CG14910 to CG15020, the following excerpt comes under the bold heading of:

**‘Proceeds lent back to purchaser**

If the proceeds of the sale are lent by the vendor to the purchaser there are two separate transactions:

1. a sale of the asset by the vendor to the purchaser with full consideration paid, and
2. a grant of a loan by the vendor to the purchaser.

In these circumstances the vendor has received full consideration for the asset. It is not appropriate to allow payment of the tax in instalments, see *Coren v Keighley* (48TC370).’

69. In the present case, the balance of the Director’s loan account would appear to be the consideration for the transfer of the business being ‘lent back’ by the vendor (Mr Friel) to the purchaser (Philip Friel Dentist Limited) as analysed in CG15020. It is therefore far from self-evident that s 280 TCGA treatment would apply in Mr Friel’s case, and any presumption that it would apply seems unjustifiable.

70. Manual SAM80072 makes it clear that the office with technical responsibility would need to: (a) confirm that the statutory instalment provisions apply, and (b) to set out the sums of payments on statutory due dates if the statutory instalment arrangement is approved. This is contrary to a unilateral proposal of a payment schedule by the taxpayer, as the letter of 3 February 2015 appeared to suggest.

71. It does not require extensive search to become aware that no presumption can be made in relation to whether s 280 TCGA treatment would apply in Mr Friel’s case. In fact, the manuals suggest that the consideration in Mr Friel’s case would not qualify for s 280 TCGA treatment. Furthermore, there is a procedure to follow whereby a CGT payment schedule would be set by HMRC even if s 280 TCGA treatment were granted. A prudent taxpayer, intent to comply with his obligations, and to avoid any late payment surcharges, would have exercised foresight to seek clearance at an early stage, and would not have presumed that s 280 TCGA applies, unless and until he had obtained confirmation from HMRC.

72. We have regard to Mr Friel's personal attributes. He is a taxpayer who has the intellectual acumen to engage with the financial implications of his business decisions and their tax consequences. He is a professional who should be wont to take proactive action. In our judgment, it was unreasonable to place reliance on s 280 TCGA treatment being available without advance clearance.

73. In concluding that Mr Friel had not taken reasonable care in placing reliance on a third party to avoid his failure to pay his CGT on time, we are saying that a prudent taxpayer with the appellant's professional attributes and intellectual abilities, and intent to avoid any late payment penalties, would have taken reasonable care to obtain advance clearance from HMRC over the s 280 TCGA treatment, before placing reliance on such dispensation being available to avert any late payment penalties.

74. For these reasons, we cannot find any reasonable excuse for any parts of the penalties to be cancelled.

#### *Whether special circumstances to reduce the penalties*

75. In line with the legislative analysis in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 0095 (TC) ('*Bluu*'), the Tribunal treats HMRC's decision on whether or not there were special circumstances as separate from the penalty decision. While the Tribunal has confirmed the penalty decision, it remains to be determined whether the decision in respect of special reduction is 'flawed' in the judicial review sense.

76. The legislation does not define 'special circumstances'. From case law, it is accepted that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152).

77. HMRC's review conclusion upheld the penalties and refused special reduction, having considered the factors: (a) agent advised that s 280 TCGA applies; (b) request to pay by instalments since 3 February 2015; (c) HMRC's delay in replying to the request. HMRC's decision as regards special reduction is not 'flawed' in the judicial review sense for the Tribunal to substitute its own decision.

78. In any event, from Ms Young's representations, there appeared to be a shortage of funds on Mr Friel's part to meet the full CGT liability by its due date of 31 January 2015. That appears to be the fundamental reason for settling the CGT by instalments. We have regard to the fact that even when HMRC's decision of 24 December 2015 was communicated, the CGT payment continued by instalments as set out in Gerber's letter of 3 February 2015, and was only fully paid on 1 February 2018.

79. Insufficiency of funds is explicitly excluded from being a reasonable excuse for cancelling a late payment penalty (para 16(2)(a) of Sch 56); nor can it be considered as giving rise to special circumstances for reducing a penalty.

**Decision**

80. For the reasons stated, the appeal is dismissed.

81. The late payment penalties in the total sum of £9,869 imposed under Schedule 56 FA 2009 are confirmed in full.

82. 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.

**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 11 FEBRUARY 2019**