



TC06558

Appeal numbers: TC/2017/09043 & TC/2017/09044

Capital Gains Tax – penalties – late filing of non-resident capital gains tax returns – whether reasonable excuse – whether ignorance of law an excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TIMOTHY COBB and CAROLINE WREN

Appellants

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 18 June 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 Notices of Appeal dated 14 December 2017 (with enclosures), HMRC's Statement of Case (with enclosures) dated 20 March 2018 and the Appellants' Reply dated 15 April 2018.

DECISION

Introduction

- 5 1. The appellants appeal against penalties for the late submission of non-resident capital gains tax (“NRCGT”) returns charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2016. The penalties for each of them are as follows:-

Penalty	£
Late filing penalty (Schedule 55, paragraph 3)	100
6 months late filing penalty (Schedule 55, paragraph 5)	300
Total	400

- 10 2. In the first instance HMRC had also issued daily penalties in the sum of £900 but those have now been withdrawn.

The law

- 15 3. In relation to disposals made on or after 6 April 2015, Parliament introduced new sections into the Taxes Management Act to make non-residents liable to file new returns, referred to as NRCGT returns. The legislation was contained in the Finance Act 2015.

- 20 4. With effect from 26 March 2015, a NRCGT return under Section 12ZB TMA was added to Schedule 55 by Finance Act 2015, section 37 and Schedule 7, paragraph 59. Paragraph 1(1) of Schedule 55 makes a person liable to a penalty if they fail to deliver a return of a type specified by the due date.

5. A failure to file the return on time engages the penalty regime in Schedule 55 (and references below to paragraphs are to paragraphs in that Schedule).

6. Penalties are calculated on the following basis:-

- 25 (a) Failure to file on time (ie the late filing penalty) - £100 (paragraph 3);
(b) Failure to file for 6 months (ie the 6 month penalty) – 5% of the payment due, or £300 (whichever is the greater) (paragraph 5); and
(c) Failure to file for 12 months (ie the 12 month penalty) – 5% of payment due or £300 (whichever is the greater) (paragraph 6).

7. If HMRC considers the taxpayer is liable to a penalty it must assess the penalty and notify it to the taxpayer (paragraph 18).

8. A taxpayer can appeal against any decision of HMRC that a penalty is payable and against any such decision as to the amount of the penalty (paragraph 20).

5 9. On an appeal, this Tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

10 10. If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

11. On an appeal to the Tribunal, the Tribunal can either confirm the same percentage reduction as HMRC have given for special circumstances or it can change that reduction if the Tribunal thinks that HMRC's original percentage reduction was flawed in the judicial review sense (paragraphs 22(3) and (4)).

15 *Reasonable excuse*

12. A taxpayer is not liable to pay a penalty if HMRC, or this Tribunal (on appeal) decides that (s)he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

20 13. However, both an insufficiency of funds, or reliance on another person, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

The facts

25 14. The appellants live in Australia.

15. The appellants jointly owned a property in the UK which they sold in 2015 having rented it out for a number of years. HMRC accept that the date of disposal for NRCGT purposes was 30 July 2015. There is no tax payable.

30 16. The appellants only realised that NRCGT returns were required in May 2016 when they commenced preparation of their self-assessment tax returns for 2015/16. Mr Cobb filed his return on 15 May 2016 and Ms Wren filed her return on 22 June 2016.

17. The returns should have been filed by no later than 29 August 2015.

35 18. The penalties were imposed on 24 June 2016. The appellants have appealed the penalties.

Grounds of appeal

19. The appellants argue that it was wrong to impose penalties particularly as no tax was payable and indeed the disposal had generated a loss after sale costs. The failure to file the returns was inadvertent in that they only became aware of the requirement to do so when completing their tax returns and they had then promptly filed the NRCGT returns.

20. They believed that since there was no question of any exposure to tax then it was reasonable to believe that the loss could be notified in the tax returns. The tax return should suffice.

21. They advanced an argument relating to calls to the HMRC helpline between 30 January and 29 April 2017 when they were apparently told matters had been resolved.

22. They argue that HMRC have been very dilatory in dealing with correspondence and in that context it is unfair to penalise them for delay.

Discussion

23. The first point to make is that both “reasonable excuse” and “special circumstances” apply to the delay in filing the returns and not to the penalties. Therefore the arguments about the telephone calls cannot amount to a reasonable excuse for the late filing as those were after the returns were filed.

24. The Tribunal’s jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok v HMRC*¹ at paragraph 36, it “... has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair”. Therefore, whether or not HMRC were dilatory, and it appears that they were, the Tribunal cannot take that into account and again that was after the returns were filed.

25. What is a reasonable excuse? There is no statutory definition but it is well established law that the concept of “reasonable excuse” is an objective test applied to the circumstances of the individual payer. I agree with Judge Berner in *Barrett v HMRC*² at paragraph 154 where he states:-

“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”.

26. The issue here is whether the appellants’ lack of awareness of the need to file the NRCGT return could, of itself, constitute a reasonable excuse. In other words, can

¹ 2012 UKUT 363 (TCC)

² 2015 UKFTT 329 (TC)

ignorance of the law in the sense of ignorance of an obligation imposed by the law, constitute a reasonable excuse?

27. The Upper Tribunal in *Perrin v HMRC*³ stated at paragraph 82:

5 “82. One situation that can sometimes cause difficulties is when the taxpayer’s asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that ‘ignorance of the law is no excuse’, and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. 10 It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long.”

28. The appellants’ absence from the UK cannot in itself amount to a reasonable excuse.

15 29. The appellants invested in this property in the UK and it appears that, when they decided to sell the property, they did not check what, if anything was required of them in terms of reporting the sale to HMRC. As they very fairly concede in their letter of 14 August 2017: “Yes, we probably should have been aware of the new requirement to fill in this extra form....”.

20 30. A UK national selling property in Australia would be expected to ensure that s(he) complied with all relevant local legislation and to take appropriate advice. In my view the need to file a return is not a complicated area of the law. The information is easily available on the HMRC website.

25 31. Perhaps it could be argued that the appellants did get muddled about what they should have done, but the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*⁴ where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

30 “What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...”.

35 32. Once they realised that returns were required, Mr Cobb appears to have acted promptly and filed his return on 15 May 2016. However, Ms Wren only filed her return more than a month later on 22 June 2016. In the context of an original time limit of 30 days that is very late. I do not accept her argument that she acted promptly when the problem was identified. They are married and I would have expected her to have acted at or about the same time as her husband.

³ 2018 UKUT 156 (TC)

⁴ 2012 UKFTT 315 (TC)

33. The fact that there was no tax due, and indeed a loss, cannot amount to a reasonable excuse since the objective of the legislation, and the penalties, is to ensure that returns are filed by a particular date imposed by statute. There are other penalties for failure to pay tax on time.

5 34. In summary, the appellants decided to sell their UK investment but did not check whether or how that sale should be reported. A prudent investor should reasonably have done so. I conclude that lack of awareness of an obligation to file a NRCGT return was not a reasonable excuse in the circumstances of the disposal of this property.

10 *Special circumstances*

35. There is no statutory definition of “special circumstances”. As long ago as 1971, in a House of Lords decision dealing with “special circumstances” in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁵ said:

15 “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

36. HMRC have confirmed that they did consider whether there should be a special reduction because of special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances. I have considered whether HMRC had acted in a way that no reasonable body could have acted, or
20 whether they took into account some irrelevant matter or disregarded something to which they should have given weight. I think not. I have also considered whether HMRC have erred on a point of law. They have not. I find no reason to disagree with their conclusion. HMRC’s decisions in that regard are not flawed when considered in light of the principles applicable in proceedings for judicial review.

25 37. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Boshier*⁶ makes it clear that I do not have the jurisdiction to consider the
30 proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

38. For all these reasons the appeal is dismissed and the penalties are confirmed.

39. This document contains full findings of fact and reasons for the decision. Any
35 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

⁵ 1971 3 All ER 967

⁶ 2013 UKUT 579 (TCC)

“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 23 JUNE 2018

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