[2018] UKFTT 397 (TC)

TC06599

Appeal number: TC/2017/06458

CAPITAL GAINS TAX – penalties – late filing of non-resident capital gains tax returns – appellant accepted the first penalty but challenged the 6 month penalty - whether reasonable excuse – no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL GRANT **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN

The Tribunal determined the appeal on 9 July 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 28 August 2017 (with enclosures), HMRC's Statement of Case dated 11 December 2017 (with enclosures).

DECISION

Introduction

1. This case concerns an appeal by Michael Grant ("the Appellant") against the imposition, pursuant to Schedule 55 Finance Act 2009, of penalties by HM Revenue & Customs ("HMRC") for the late submission of a non-resident capital against tax return ("NRCGT return").

2. The penalties imposed were:

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

3. According to HMRC's statement of case, the Appellant had also rendered himself liable to daily penalties, however, "following representations from a number of customers and agents" HMRC withdrew/no longer issue daily penalties and those charged to the Appellant were cancelled.

The facts

4. The following description of the facts is taken from the Appellant's grounds of appeal and HMRC's statement of case and the documents attached to each. The facts do not appear to be in dispute.

5. At the time relevant to the appeal, and as far as the Tribunal is aware currently, the Appellant resides in the Republic of Ireland.

6. On 15 January 2016 the Appellant sold UK property in respect of which a NRCGT return was required to be filed by 14 February 2016.

7. The Appellant filed the NRCGT return on 29 November 2016.

8. Penalties were issued on 28 July 2017.

9. By letter dated 9 February 2017 (and before the penalties were issued) the Appellant's representative wrote to HMRC regarding the Appellant and two other clients in connection with their late filing position. By this letter it was explained that on 27 April 2016 the representatives had spoken with Alan McGuiness of HMRC

querying whether self-assessment tax returns or NRCGT returns were required in respect of property disposals by their clients. By reference to that letter it is stated that Mr McGuiness confirmed that it was the taxpayers' responsibility to report the transactions but that there was no policy in force as the reporting scheme was new and the revenue were looking to see how things worked out.

10. Following that call the representatives completed the NRCGT return on behalf of the Appellant, printed it and sent it to the Appellant for approval. The hard copy NRCGT return was sent to HMRC on 7 October 2016. A further call was made to Mr McGuiness at that time who, by reference to the letter, confirmed that a paper return would be in order.

11. By letter dated 3 November 2016 HMRC informed the Appellant's representative that only online forms were acceptable. This letter resulted in submission of the online NRCGT return on 29 November 2016.

12. The Appellant's representative's letter also raised that nil tax was due in connection with the disposal.

13. As indicated at paragraph 8 above the penalties were issued on 28 July 2017. There is no copy of any correspondence following the penalty assessment appealing the decision rom the Appellant or his representatives but on 29 July 2017 HMRC acknowledged the Appellant's appeal stating:

> "I don't agree that you have a reasonable excuse because the conversation that took place with Alan McGuiness appears to have been in relation to the Finance Act 2016, section 91 inserted TMA70 s12ZBA, and elective returns which doesn't [sic] apply in this case. Any uncertainties would have been regarding how to handle cases prior to Royal Assent and whether there were plans to extend the s12ZBA exception to other cases, such as any case where no tax is due and there were no plans in April 2016 or any plans at the current time. On this basis, I am sorry to tell you that I do not accept that there is a reasonable excuse for filing the NRCGT Return late."

14. An independent review was offered in that letter.

15. HMRC's statement of case confirms that the Appellant accepted the offer of a review but the document in which he did so is not attached to the statement of case nor is it elsewhere in the Tribunal file.

16. HMRC's response dated 31 July 2017 indicated that the review was conducted on the basis that the Appellant contended:

(1) There were uncertainties as to whether a NRCGT return was due

(2) There was no capital gains tax liability therefore a penalty was not appropriate.

17. The review confirmed the penalties finding there to be no reasonable excuse and no basis on which to reduce the penalties by reference to special circumstances.

18. In respect of the issues raised by the Appellant HMRC specifically responded:

(1) "The legislation states if you are non-resident and have sold or disposed of a property after 5 April 2015, you are required to complete the NRCGT return within 30 days of disposal. While you [sic] agent did check the positon with HMRC in April 2016 concerning the submission of the NRCGT return, this does not explain the delay in the actual filing of the NRCGT return.

From information your agent has supplied, I understand that shortly after contacting HMRC your agent sent copies of the NRCGT return to you for your approval. Upon receipt of this return your agent in October 2016 tried to file the return with HMRC. The issue of whether paper or electronic NRCGT return was sent to HMRC is not relevant as this action occurred after the 6 month late penalty was due in August 2016.

In the letter of 7 October 2016 you [sic] agent apologised for delay due [sic] the three owners being resident in Ireland, this is not considered a reasonable excuse for the delay as there was sufficient delay between your agent sending the NRCGT return to you in May 2016 and August 2016 when the return was 6 months late."

(2) "Although your agent states there was no capital gains tax to pay, all disposals must be reported to HMRC irrespective of whether there is a tax liability. The same reporting process applies regardless of whether there is a chargeable gain, a gain covered by the annual exempt amount, a gain covered by a relief such as PRR or a loss.

The Finance Act 2016 amended the NRCGT return filing obligation where the no gain/no loss provisions apply to a disposal (such as a transfer to a spouse). Because no gain, and so no payment on account, can arise on such disposals, the obligation to make a NRCGT return was removed. This has been applied retrospectively so that any NRCGT returns that may not have been submitted need not now be made and late filing penalties do not apply to any returns that have been made for such disposals. The exemption does not apply where the computation results in either no gain/or a loss, such as a result of market values or allowable deductions, and a NRCGT return continues to be required. As previously stated this provision does not apply in your case.

Though the agent has stated the 6 month penalty of £300 is not appropriate, the structure and level of penalties was fully considered when legislated by Parliament, given consideration to all likely effects across regimes and types of taxpayers. The penalties are in place as a measure of fairness so that individuals who file late do not gain any advantage over those who file on time.

Whilst HMRC has used its discretion in withdrawing the daily penalties following a review of representations by customers and agents. The fixed penalty of £300 is set in legislation over the raising of which HMRC does not have the power to exercise discretion therefore is due."

The law

19. As a consequence of an amendment to Taxes Management Act 1970 ("TMA") introduced by the Finance Act 2015 ("FA 2015") and having effect from 6 April 2015, non-residents became liable to make NRCGT returns as follows:

> "**12ZB NRCGT return**
>
> (1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue & Customs, on or before the filing date, a return in respect of the disposal.
>
> (2) In subsection (1) the 'appropriate person' means:
>
> (a) The taxable person in relation to the disposal ….
>
> (3) …
>
> (4) An NRCGT return must:
>
> (a) Contain the information prescribed by HMRC, and
>
> (b) Include a declaration by the person making it that the return is to the best of the person's knowledge correct and complete.
>
> (5) …
>
> (6) …
>
> (7) An NRCGT return 'relates to' the tax year in which any gains on the non-resident CGT disposal would accrue.
>
> (8) The 'filing date' for a NRCGT return is the 30th day following the day of the completion of the disposal to which the return relates. But see also 12ZJ(5)."

20. The penalties for failing to make an NRCGT return are contained in Schedule 55 Finance Act 2009 ("FA 2009").

21. Paragraph 1(1) of Schedule 55 makes a person liable to a penalty if they fail to deliver a return of the type specified by the due date. With effect from 26 March 2015, a NRCGT return under s12ZB of TMA was added to the Schedule by FA 2015 section 37 and Schedule 7 paragraph 59.

22. Paragraph 3 Schedule 55 permits HMRC to impose a £100 penalty on a taxpayer if the return is late. Paragraph 5 permits HMRC to impose a tax geared penalty of 5% of the return is 6 months late, but with a minimum penalty of £300.

23. Paragraph 23 Schedule 55 legislation provides that a taxpayer may be relieved from penalties if he or she can show there was a "reasonable excuse" for the failure to render the NRCGT return.

24. As is noted in the judgment of the tribunal in *Raymond Hurt [2018] UKFTT 207* the reasonable excuse defence also appears to arise pursuant to s118(2) TMA.

Pursuant to s118(2) the defence of reasonable excuse has the effect that the NRCGT return is deemed not to have been late (thereby removing liability to a penalty).

25. The effect of a reasonable excuse under paragraph 23 Schedule 55 discharges the penalty. However, paragraph 23 Schedule 55 is a more restrictive provision because excludes from the scope of what constitutes a reasonable excuse: (1) insufficiency of funds, unless attributable to events outside the taxpayer's control, and (2) reliance on a third party unless the taxpayer took reasonable care to avoid the failure. The difference between s118(2) and paragraph 23 could be significant in the present appeal because the Appellant's grounds of appeal makes reference to reliance on his accountants.

26. At paragraph 16 Schedule 55 FA 20009 HMRC is given the power to reduce penalties owing to the presence of "special circumstances". The legislation excludes: an inability to pay or an argument that there is no loss of revenue as between two taxpayers, from the circumstances relevant when considering a reduction in a Schedule 55 penalty.

Burden of proof

27. It is for HMRC to establish, on the balance of probabilities, that the Appellant is liable to a penalty. As set out in the recent Upper Tribunal judgment in the matter of *Christine Perrin [2018] UKUT 156* paragraph 69, a mere assertion of the occurrence of the relevant events in the statement of case is not sufficient to meet that burden. Evidence is required and unless there is sufficient evidence to prove the relevant facts on the balance of probabilities the case of the penalty will not be made out.

28. In the present case the Appellant disposed of a property in the UK whilst non-resident. The Appellant was required to render a NRCGT return within 30 days of the disposal. The Appellant failed to render the NRCGT return within that time HMRC have therefore established a liability to the penalties imposed.

29. Having established that liability it is for the Appellant to establish, on the balance of probability and by reference to the circumstances which gave rise to the failure to render the NRCGT return, whether a reasonable excuse is established or whether the circumstances, whilst falling short of a reasonable excuse, nevertheless represent special circumstances.

30. The role of the Tribunal (as set out in *Perrin*) is a "value judgment" [70] taking account of "all relevant circumstances; because the issue is whether the particular taxpayer had 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." [71] (original emphasis)

Grounds of appeal

31. By his notice of appeal the Appellant contends:

"My name is Michael Grant and I was a part owner of an apartment in Woking Surrey. When we sold the property we hired Myrus Smith to ensure that we were adhering to all legal requirements in the UK. They assured us that we were not liable for non-resident capital gains tax and I duly paid my capital gains in Ireland through the accountants MK Brazil and Co.

However, unknown to me it appears that Myrus Smith were late in filing an NRCGT and this is the reason for my fine. We paid Myrus Smith in full to represent us and it seems unfair that I am asked for a further 400 stg for something I am innocent of, and I have paid all my taxes to the appropriate authority. Hope you can understand my predicament."

HMRC's case

32. HMRC contends that the Appellant has failed to establish a reasonable excuse. They contend that the fact that no tax is due is immaterial as it does not impact the requirement to render the return. They further contend that the communication with Mr McGuiness occurred after the 30 day time limit expired and that the paper return was render after 6 months had expired and as such neither provide a reasonable excuse.

33. They contend that there is nothing uncommon or exceptional justifying a reduction in the penalty as a consequence of special circumstances.

Reasonable excuse?

34. It is important when considering a claim to a reasonable excuse that the majority of taxpayers do file returns on time and are entitled to expect that compliance will be enforced. A reasonable excuse should therefore fully justify the relevant inaction by a non-compliant taxpayer such that it is just that such non-compliance should be excused.

35. There is much case law, arising over a long period, concerning what does and does not constitute a reasonable excuse. The case law is clear that the test for establishing a reasonable excuse is an objective text applied to the individual circumstances of the taxpayer.

36. The appropriate test that has been repeatedly endorsed is that set out by His Honour Judge Medd in *The Clean Car Co [1991] VATTR 239*:

"So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".

A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out and which Mr Pellew-Harvey [for the

Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.

In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. If has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position of the taxpayer found himself, to do? … It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standard of reasonableness which one would expect to be exhibited by a taxpayer who had a reasonable attitude to his duties as a taxpayer, but who in other respects shared the attributes of the particular appellant as the tribunal considered relevant to the situation considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

37. How the test for reasonable excuse is applied in the context of NRCGT returns is more limited as the appeals against penalties for failure to render NRCGT returns are only now coming through the tribunals. Most such appeals appear to be based on a contention that the Appellant was unaware of the obligation to render the NRCGT return.

38. The Appellant does not plead ignorance as the basis for his reasonable excuse. By reference to the notice of appeal (and to a lesser degree the correspondence from his representatives) the basis of his reasonable excuse is that he relied upon his representatives.

39. There is a great deal more case law regarding reliance on a third party in the context of reasonable excuse. As set out above reliance on a third party is explicitly excluded from establishing a reasonable excuse under paragraph 23(2)(b) Schedule 55 unless the taxpayer can show that he personally took reasonable care to avoid the failure and provided that the NRCGT was filed without unreasonable delay after the excuse ceased. It is not similarly excluded under s118 TMA.

40. The case of *Hart* considers this apparent conflict between the provisions. That tribunal considers whether Mr Hart can show that he acted with reasonable care and concluded that as he had specifically appointed tax advisers and provided them with all the necessary and relevant information, and concluded on the facts that he had acted with reasonable care.

41. At paragraph [86] the tribunal goes on to note:

> "In any event, the second provision on which Mr Mart can rely in relation to a "reasonable excuse" defence is section 118(2) TMA. This contains no equivalent to paragraph 23(2)(b). The only question is whether in all the circumstances Mr Hart had a reasonable excuse for his failure to file a NRCGT. For the same reasons given above I have decided that Mr Hart did have a reasonable excuse. He could reasonably have expected his UK tax advisers to inform him of the need to file the return, having informed them of the disposal of the Property".

42. This view is consistent with the historic case law concerning other filing penalties.

Discussion

43. There is limited evidence on which the Tribunal can take its decision in this case.

44. One particular difficulty for the Appellant is that he appears (by payment of the £100) to have accepted liability for late filing of the NRCGT return.

45. Paragraph 23 Schedule 55 provides for a reasonable excuse where there is a failure to make a return. In the case of *DR Sudall [2017] UKFTT 404* which concerned late self-assessment filings the Tribunal considered whether the structure of the legislation contemplated a situation in which a reasonable excuse might arise after the filing date but not before it so as to avoid liability to a 3 or 6 month filing penalty.

46. At [22] the judge in that case concludes that "the scheme of the legislation makes it clear that for the defence of reasonable excuse to be available, there must in all cases be a reasonable excuse for the initial failure to file on time." This conclusion is based on the following considerations: (1) the penalties are imposed for failure to submit the return, that occurs when the filing deadline occurs; (2) there is no new failure after 3 months or 6 months; (3) reasonable excuse applies to relieve the failure and paragraph 23(2)(c) envisages that the failure will continue.

47. By his own case the Appellant accepts that there was a failure to render the return within the 30 day time limit. In light of the *DR Sudall* judgment, which the Tribunal considers to be correct, there is no basis on which the Appellant can seek to have the 6 month penalty discharged (under paragraph 23 Schedule 55) or have the return treated as not having been rendered late (under s118(2)).

48. The Tribunal considers the grounds of challenge raised by the Appellant and his representatives further in the context of special circumstances.

Special Circumstances

49. As indicated above, paragraph 16 Schedule 55 provide that HMRC may reduce a penalty because of special circumstances. The Tribunal can review the exercise of HMRC's discretion to allow such a reduction. If in exercising their discretion HMRC took into account material that they should have not considered or failed to consider relevant material the Tribunal may intervene and reconsider whether special circumstances exist. Where HMRC's decision is not flawed the Tribunal may not intervene. In the event that it is flawed the Tribunal may nevertheless uphold the conclusion if, on the evidence, the outcome was inevitable.

50. HMRC considered special circumstances in their review decision by reference to the basis for challenge at that time. They rejected any basis for establishing special circumstances. They do not appear to have reconsidered special circumstances by reference to the Appellants grounds of appeal.

51. The Tribunal has considered the factors raised in this appeal both by the Appellant's representatives and the Appellant in the context of special circumstances. In the Tribunal's view the legislation does not prevent the application of special circumstances on the six month penalty independently of the original penalty. Special circumstances are not specific to a failure but to the penalty.

52. On the limited evidence it is apparent that there was a degree of confusion as between the Appellant's representatives and HMRC regarding the conversation in April. On the basis of the information available it is not possible for the Tribunal to determine whether the representatives were simply confused or whether there was any contribution by Mr McGuiness to that confusion. There is no direct evidence but it does not appear to be the case that the representative contested HMRC's position as to what Mr McGuiness had said or the basis on which he said it as set out in the review letter. The Tribunal therefore concludes that there is no evidence on which to base a special circumstances reduction by reference to those conversations.

53. HMRC's statement of case does not appear to addresse the Appellant's contention that he should be relieved of the 6 month penalty because he relied on his representatives. To the extent that they have not considered this factor, and as the statement of case does not address it directly at all, their decision on special circumstances is flawed.

54. Paragraph 16 Schedule 55 does not exclude special circumstances arising by reference to reliance on a third party, indeed other tribunals have taken the conduct of the Appellant in the context of their relationship with advisors into account in relation to special circumstances.

55. The Tribunal reflects on the circumstances in which the 6 month penalty arose in the present case. 6 months expired in August 2016. In terms of the chronology the Appellant had undoubtedly appointed Myrus Smith whose letter head indicate are

accountants, no reference is made to their being tax advisors. However, the Tribunal considers it reasonable that the Appellant may have considered that accountants should be capable of correctly determining the appropriate course of action for the Appellant in connection with NRCGT. The Tribunal finds that he was entitled to rely on the representative.

56. However, when considering whether the Appellant's reliance on Myrus Smith can constitute a special circumstance it is appropriate to also consider the Appellant's conduct. It appears that in May 2016, shortly after the call with HMRC, the representatives sent the printed NRCGT return to the Appellant for signature but the Appellant did not return it until October by which time the 6 month penalty had been incurred. Had the Appellant immediately signed and returned the paper NRCGT to the accountants before the 6 months had expired the Tribunal would have considered that to have constituted special circumstances. But that is not the factual situation in this case. Ultimately it was the Appellant's delay and not the confusion over the paper return which led to the imposition of the 6 month penalty

57. By reference to cases such as *Welland v HMRC [2017] UKFTT 870* it is clear that the fact that there is no loss of tax is also irrelevant to whether there are special circumstances because it does not, of itself, influence whether a NRCGT is due or prevent the taxpayer from filing the return.

58. The Tribunal therefore concludes that there are no special circumstances applicable in the present case.

Decision

59. For the reasons given above the Tribunal determines that the liability to the penalties has been established by HMRC and that the Appellant has not been able to satisfy the Tribunal as to the existence of a reasonable excuse or as to special circumstances.

60. Accordingly the appeal is dismissed.

61. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 16 JULY 2018