[2018] UKFTT 569 (TC)

TC06743

Appeal number: TC/2017/04899

CAPITAL GAINS TAX – non-resident CGT return – penalties of £1,600 for failure to file return within 30 days of completion of property sale – whether HMRC have shown penalty due: no, Article 13 Protocol 7 to the Treaty for the Functioning of the European Union makes the appellant UK resident – whether ignorance of law reasonable excuse: yes, following* Perrin *in Upper Tribunal – whether reliance on third party reasonable excuse: yes – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEN SLOCOCK **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 30 August 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 24 January 2018 (with enclosures), HMRC's Statement of Case (with enclosures) dated 14 February 2018, the Appellant's Reply dated 25 February 2018, HMRC's further Reply dated 7 March 2018 and the appellant's response to that Reply dated 15 March 2018 and having read the parties' comments made on 16 and 24 September in response to directions issued 11 September 2018.

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DECISION

1. The penalty under appeal is for the tax year 2015-16 and is £1,600 for the failure to make and deliver a non-resident capital gains tax ("NRCGT") return until over one year after the due date. The failure is that of Mr Ben Slocock ("the appellant").

The facts

2. I take the basic undisputed facts from the amended statement of case ("SoC") filed by the respondent ("HMRC") and from the documents attached to that SoC as well as from letters sent by the appellant to HMRC and the tribunal.

3. On 18 October 2016 the appellant delivered by electronic communication a return under s 12ZB Taxation of Chargeable Gains Act 1992 ("TCGA") to HMRC in electronic form. A printout of the return entries shows:

(1) the appellant's address as Rue des Mélèzes 8, Brussels, Belgium

(2) the disposal of an interest in land at 7 Halls Farm Close, Knaphill, Woking, Surrey, United Kingdom

(3) the date of conveyance was 4 September 2015

(4) no election was made for an alternative method of computation

(5) the computation showed a gain of £6,325

(6) the amount of CGT due was nil.

4. On 1 December 2016 October 2017 HMRC (NRCGT) wrote to the appellant. The letter was headed "Non-resident Capital Gains Tax (NRCGT)" in large bold type. The next line also in bold type was "Late filing penalties" and in the next line, also in bold "These penalties total £1600.00".

5. After salutations and listing the address of the property in the UK, the letter continued:

> "I have received a (*sic*) NRCGT return from you relating to the disposal of the above property on 4 September 2015.
>
> This property was subject to NRCGT (*sic*) and, (*sic*) you were required to file an NRCGT return within 30 days of the sale being finalised which was on 04 October 2017.
>
> We did not receive this return until 18 October 2016.
>
> This is a notice of assessment for (*sic*) a late filing penalty under Schedule 55 of the Finance Act 2009."

6. The second page contained the actual notice of the assessment which charged £1,600 for "the period from 4 October 2015 to 18 October 2016".

7. Appeal rights were then described, that an appeal must be made in writing by 30 October 2017. The copy of the letter in the bundle contained neither a signature block

nor the name of any signatory not even the team from which it came. The papers in the bundle include a "Notification of Charge and Notice to Pay" dated 2 December 2016 (a day after the letter constituting notice of assessment). It requires payment by 1 January 2017.

8. On 21 December 2016 the appellant wrote to HMRC appealing against the penalties. He gave as his grounds of appeal, set out here in précis form and labelled by me:

(1) He could not possibly have known of his obligation to file the return and it was not reasonable of HMRC to expect him to follow all tax changes in the UK [Ignorance of law].

(2) The conveyancing firm he used knew he was non-resident but did not alert him. [Reliance on third party]

(3) Had he been resident for UK CGT purposes he would not have had to file the NRCGT return but would simply have put the gain on the annual tax return. This is discrimination on grounds of residence. [Discrimination]

(4) He files an income tax return because he is UK resident for income tax purposes by virtue of being a civil servant employed by the EU institutions. It was reasonable for him to think that his returning of the gain (within the annual allowance) was sufficient. [Liability to file tax return sufficient]

(5) He took immediate steps to file the return after finding out about the requirements. [Immediate remedy]

9. He said that these considerations manifestly constitute a reasonable excuse in the sense of paragraph 23 Schedule 55 to the Finance Act ("FA") 2009 (which he had looked up).

10. He made the further point that the level of penalties was disproportionate given that no CGT was payable on the transaction. [Proportionality]

11. He also raised further points which I deal with later.

12. On 15 March 2017 the NRCGT Team replied. The letter writer did not agree that the appellant had a reasonable excuse for late filing of the return. Such an excuse, they said, could only be one where an unusual or unexpected event, either unforeseeable or beyond the appellant's control prevented him from sending his return in on time.

13. The letter went on to explain that in particular HMRC did not "normally" accept that various matters, including "ignorance of basic law", could be a reasonable excuse.

14. An explanation of the appellant's right to provide further information, request a review or to ask the tribunal to decide the matter was given.

15. On 8 April 2017 the appellant responded to the Late Penalties Reasonable Excuse Team in relation to two penalties of more than £2,500 assessed on him for the late submission on two NRCGT returns, one of which was the one the subject of this appeal.

In this letter the appellant explained his circumstances, that he had lived outside the UK for 20 years (the NRCGT return shows that he is a European Civil Servant) and in that time he has rented out property in the UK (the NRCGT return shows that he is the one-third joint owner with his sister and brother) and that he had returned the income from the properties on his income tax return each year.

16. He repeated the "ignorance of the law" argument (§8(1)) and added that there was no tax due and so no loss to HMRC, and his failure, for which he apologised, was not deliberate. He asked for a review, and for the penalties to be removed, as had been done according to an extract from the ICAEW website he attached (but which is not in the bundle).

17. In the Form SA634 on which he requested a review of the penalties in this case he said that the decision letter of 15 March 2017 (§§9 to 11) did not answer the arguments in his letter of 21 December 2016. As to the "ignorance of the law" argument he added that:

> "The letter says 'ignorance of basic law' is not an excuse. But a filing obligation deep in a schedule is not 'basic law'. It was not mentioned in the Budget Book of March '15 nor in the CGT Notes of April '15. Gov.uk has thousands of pages and I had no reason to look at it for this purpose."

18. On 10 May 2017 Ms T J Storey of the Late Penalties Reasonable Excuse Team wrote to the appellant with the conclusion of the review she had carried out. In this letter she said:

> "Your agent requested a review of HMRC's decision"

a statement which ignores both the fact that SA634 referred to acceptance of an offer, and that there had been no mention of an agent, the SA634 and all previous correspondence having been signed personally by, and coming from, the appellant. The letter makes no mention of, and the bundle does not include, any "view of the matter" by any officer of HMRC as is required by s 49B Taxes Management Act 1970 ("TMA") before a statutory review may be carried out.

19. In relation to daily penalties Ms Storey's letter said the HMRC had reviewed its position following representations from a number of customers and agents. She could "confirm" (without anyone in HMRC having previously mentioned the point) that HMRC would no longer be issuing daily penalties and that past daily penalties were in the process of being withdrawn. Indeed in her next sentence she did just that and "cancelled" £900 of the penalty.

20. In relation to the other penalties she upheld HMRC's decision to assess them. I consider the basis on which she did that later.

21. She also said she had considered whether there were special circumstances that would justify a special reduction of the remaining penalties. She had considered the same arguments of the appellant that she had attributed to him in respect of reasonable

excuse, and came to the conclusion that there were no special circumstances in his case. Again I consider the basis on which she did that later.

22. On 5 June 2017 the appellant replied. He made the point emphatically that he did not accept the ruling in the review conclusion letter as to what responsibility it was reasonable to place on taxpayers. He did so by reference to the well known obligation on honest taxpayers to make a return in October or later if online and to make two payments on account with an extract from the HMRC website and contrasted this with the NRCGT requirement which falls outside the cycle of obligations and applies only to non-residents, and that it was unrealistic (the word being both emboldened and underlined) to expect people with busy lives to familiarise themselves with such new strange quirks in the legislation. He asked to be informed of any comparable requirement in income tax or capital gains tax.

23. He referred to Ms Storey's citation of the Chancellor's Autumn Statement of 2013 and pointed out that it did not say anything about a penalty. He queried Ms Storey's view that it was unrealistic for HMRC to contact every potential customer, saying it was realistic to have expected greater attention to be drawn to the new requirement by ensuring that solicitors and conveyancers were aware of it through the Law Society or mentioning the requirement on Land Registry documents. He added that in his experience solicitors were unaware, so how should a regular taxpayer be expected to know?

24. He offered to pay the £100 penalty, but not the 6 and 12 month penalties, expressing the view that it was illogical for HMRC to withdraw the daily penalties but not the later ones.

25. Ms Storey's reply on 29 June 2017 was to say that he could not have another review (for which he had not asked) but that she had considered all he had said and did not change her mind, though she did not give any reasons for rejecting the many points the appellant had made.

26. By email sent on 12 June 2017 the appellant notified his appeal to the Tribunal showing the penalties as £700.

Law

27. The law that applies to NRCGT returns is in TMA:

> "**12ZA Interpretation of sections 12ZB to 12ZN**
>
> (1) In sections 12ZA to 12ZN—
>
> "advance self-assessment" is to be interpreted in accordance with section 12ZE(1);
>
> "amount notionally chargeable" is to be interpreted in accordance with section 12ZF(1);
>
> "filing date", in relation to an NRCGT return, is to be interpreted in accordance with section 12ZB(8);

"interest in UK land" has the same meaning as in Schedule B1 to the 1992 Act (see paragraph 2 of that Schedule);

the "taxable person", in relation to a non-resident CGT disposal, means the person who would be chargeable to capital gains tax in respect of any chargeable NRCGT gain (see section 57B of, and Schedule 4ZZB to, the 1992 Act) accruing on the disposal (were such a gain to accrue).

(2) In those sections, references to the tax year to which an NRCGT return "relates" are to be interpreted in accordance with section 12ZB(7).

(3) For the purposes of those sections the "completion" of a non-resident CGT disposal is taken to occur—

(a) at the time of the disposal, or

(b) if the disposal is under a contract which is completed by a conveyance, at the time when the asset is conveyed.

(4) For the meaning in those sections of "non-resident CGT disposal" see section 14B of the 1992 Act (and see also section 12ZJ).

(6) In this section "conveyance" includes any instrument (and "conveyed" is to be construed accordingly).

12ZB NRCGT return

(1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and 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) A return under this section is called an "NRCGT return".

(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.

(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 an NRCGT return is the 30th day following the day of the completion of the disposal to which the return relates.

But see also section 12ZJ(5).

12ZBA Elective NRCGT return

(1) A person is not required to make and deliver an NRCGT return under section 12ZB(1), but may do so, in circumstances to which this section applies.

(2) The circumstances to which this section applies are where the disposal referred to in section 12ZB(1) is—

(a) a disposal on or after 6 April 2015 where, by virtue of any of the no gain/no loss provisions, neither a gain nor a loss accrues, or

(b) the grant of a lease on or after 6 April 2015 which is—

(i) for no premium,

5 (ii) to a person who is not connected with the grantor, and

(iii) under a bargain made at arm's length.

(3) For the purposes of subsection (2)—

"connected" is to be construed in accordance with section 286 of the 1992 Act;

10 "no gain/no loss provisions" has the meaning given by section 288(3A) of the 1992 Act;

"lease" and premium" have the meanings given by paragraph 10 of Schedule 8 to the 1992 Act.

…

15 (7) Paragraph 1 of Schedule 55 to the Finance Act 2009 (penalty for late returns) does not apply in relation to an NRCGT return which is made and delivered by virtue of this section.

…

12ZE NRCGT return to include advance self-assessment

20 (1) An NRCGT return ("the current return") relating to a tax year ("year Y") which a person ("P") is required to make in respect of one or more non-resident CGT disposals ("the current disposals") must include an assessment (an "advance self-assessment") of—

(a) the amount notionally chargeable at the filing date for the
25 current return (see section 12ZF),

….

But see the exceptions in section 12ZG.

12ZF The "amount notionally chargeable"

(1) The "amount notionally chargeable" at the filing date for an
30 NRCGT return ("the current return") is the amount of capital gains tax to which the person whose return it is ("P") would be chargeable under section 14D … of the 1992 Act for the year to which the return relates ("year Y"), as determined—

(a) on the assumption in subsection (2),

35 (b) in accordance with subsection (3), and

(c) if P is an individual, on the basis of a reasonable estimate of the matters set out in subsection (4).

(2) The assumption mentioned in subsection (1)(a) is that in year Y no NRCGT gain or loss accrues to P on any disposal the completion of
40 which occurs after the day of the completion of the disposals to which the return relates ("day X").

(3) In the determination of the amount notionally chargeable—

(a) all allowable losses accruing to P in year Y on disposals of assets the completion of which occurs on or before day X which are available to be deducted under paragraph (a) or (b) of section 14D(2) or (as the case may be) section 188D(2) of the 1992 Act are to be so deducted, and

(b) any other relief or allowance relating to capital gains tax which is required to be given in P's case is to be taken into account, so far as the relief would be available on the assumption in subsection (2).

(4) The matters mentioned in subsection (1)(c) are—

(a) whether or not income tax will be chargeable at the higher rate or the dividend upper rate in respect of P's income for year Y (see section 4(4) of the 1992 Act), and

(b) (if P estimates that income tax will not be chargeable as mentioned in paragraph (a)) what P's Step 3 income will be for year Y.

(5) An advance self-assessment must, in particular, give particulars of any estimate made for the purposes of subsection (1)(c).

(6) A reasonable estimate included in an NRCGT return in accordance with subsection (5) is not regarded as inaccurate for the purposes of Schedule 24 to the Finance Act 2007 (penalties for errors).

(8) For the purposes of this section—

an estimate is "reasonable" if it is made on a basis that is fair and reasonable, having regard to the circumstances in which it is made;

"Step 3 income", in relation to an individual, has the same meaning as in section 4 of the 1992 Act.

…

(10) Section 989 of ITA 2007 (the definitions) applies for the purposes of this section as it applies for income tax purposes.

(11) For the meaning of "NRCGT gain" and "NRCGT loss" see section 57B of, and Schedule 4ZZB to, the 1992 Act.

12ZG Cases where advance self-assessment not required

(1) Where a person ("P") is required to make and deliver an NRCGT return relating to a tax year ("year Y"), section 12ZE(1) (requirement to include advance self-assessment in return) does not apply if condition A, B or C is met.

(2) Condition A is that P … has been given, on or before the day on which the NRCGT return is required to be delivered, a notice under section 8 or 8A with respect to—

(a) year Y, or

(b) the previous tax year,

and that notice has not been withdrawn.

…

12ZH NRCGT returns and annual self-assessment: section 8

(1) This section applies where a person ("P") … —

(a) is not required to give a notice under section 7 with respect to a tax year ("year X"), and

(b) would be required to give such a notice in the absence of section 7A (which removes that duty in certain cases where the person has made an NRCGT return that includes an advance self-assessment).

(2) In this section, "the relevant NRCGT return" means—

(a) the NRCGT return by virtue of which P is not required to give a notice under section 7 with respect to year X, or

(b) if more than one NRCGT return falls within paragraph (a), the one relating to the disposal which has the latest completion date.

(3) P is treated for the purposes of the Taxes Acts as having been required to make and deliver to an officer of Revenue and Customs a return under section 8 for the purpose of establishing, with respect to year X, the matters mentioned in section 8(1).

(4) For the purposes of subsection (3), section 8 is to be read as if subsections (1E) to (1G) of that section were omitted.

(5) If P does not give a notice under subsection (6) before 31 January in the tax year after year X, the Taxes Acts have effect, from that date, as if the advance self-assessment contained in the relevant NRCGT return were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(6) If P gives HMRC a notice under this subsection specifying an NRCGT return which—

(a) relates to year X, and

(b) contains an advance self-assessment,

the Taxes Acts are to have effect, from the effective date of the notice, as if that advance self-assessment were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(7) References in the Taxes Acts to a return under section 8 (for example, references to amending, or enquiring into, a return under that section) are to be read in accordance with subsections (5) and (6).

(8) A notice under subsection (6)—

(a) must be given before 31 January in the tax year after year X;

(b) must state that P considers the advance self-assessment in question to be an accurate self-assessment in respect of year X for the purposes of section 9.

(9) The "effective date" of a notice under subsection (6) is—

(a) the day on which the NRCGT return specified in the notice is delivered, or

(b) if later, the day on which the notice is given.

(10) The self-assessment which subsection (5) or (6) treats as having been made by P is referred to in this section as the "section 9 self-assessment".

(11) If P—

(a) gives a notice under subsection (6), and

(b) makes and delivers a subsequent NRCGT return relating to year X which contains an advance self-assessment,

that advance self-assessment is to be treated as amending the section 9 self-assessment.

(12) For the purposes of subsection (11), an NRCGT return made and delivered by P ("return B") is "subsequent" to an NRCGT return to which P's notice under subsection (6) relates ("the notified return") if the day of the completion of the disposal to which return B relates is later than the day of the completion of the disposal to which the notified return relates."

28. The provisions of Schedule 55 FA 2009 imposing penalties for late returns that are relevant to this case are lengthy and, unlike those for NRCGT returns, familiar to many likely readers of this decision so I have put them in an Appendix.

The appeals and their late notification to the Tribunal

29. The review conclusions letter from Ms Storey was dated 10 May 2017. In it she said, under the heading "Action to take within 30 days of this letter":

> "If you decide to appeal to the Tribunal you must do so within 30 days of the date of this letter. If I do not hear from you and you do not send your appeal to the tribunal within 30 days, your appeal will be treated as settled on the basis of my conclusion above and you will have to pay the penalties if not already paid."

30. In his reply of 5 June 2017 (see §22) he had asked for some leeway in relation to the 30 days from 10 May 2017 which Ms Storey had given to him to respond to the review by notifying his appeal to the Tribunal, referring to the fact that he had received the letter on a day in the week beginning 22 May (he had been away until the end of that week and did not know the exact day) and that since receipt of it his father had been very sick and died on 3 June, giving him as executor a large amount of administrative work. The letter was stamped as received by HMRC on 12 June.

31. When Ms Storey replied in a letter dated 29 June 2017 (see §25) she did not respond to the appellant's request for an extension of time. Instead she merely pointed out that the 30 day deadline for appealing had expired but that he could ask for permission to notify the appeal late (in fact she said "accept a late appeal" which is wrong). Nor did she refer to her letter of 10 May 2017 or the statement in it that, by reason of the appellant's failing to notify the Tribunal within 30 days, the appeals were deemed settled under s 54 TMA in accordance with her conclusions.

32. Unbeknown to Ms Storey the appellant emailed the Tribunal on 12 June 2017 enclosing a Notice of Appeal (as the form is slightly misleadingly called, given that notice of appeal was in fact given to HMRC). In that notice in part 7 the appellant stated that the latest time by which the appeal should have been notified was 10 June 2017 and he asked for permission to notify the appeal outside the relevant time limit. He gave as his reasons for the lateness:

> "The letter from [Ms Storey] was dated 10 May but like all HMRC mail took about 2 weeks to arrive (delivered in the week of 22 May: I cannot give you a precise date as I was away that week).
>
> After that my father was extremely ill and died on 3 June, and as you can imagine I have had other priorities.
>
> I have however attempted to file this appeal as soon as possible thereafter."

33. On 6 July the Tribunal acknowledged receipt of the notice of appeal which they correctly said was dated 10 June (though emailed to them on 12 June) and said that the notice of appeal "includes an application for permission to make a late appeal" (in fact it is permission to notify his appeal already given to HMRC that the appellant was seeking) and that HMRC "may object to your application". They added that if the appellant did object or the judge was unwilling to give permission, the tribunal would give the appellant the opportunity to say more.

34. On 1 November HMRC sent their statement of case to the tribunal and the appellant. Neither it nor any other earlier communication from HMRC mentions the lateness of the notification.

35. One other matter about the Notice of Appeal needs mentioning. The figure given in Part 3 in a box whose rubric is "The amount of tax or penalty or surcharge (if applicable)" is £700, not the £1,600 which is the total of the amounts of the assessment all notified in the single notice.

36. The appellant, as would be expected from a senior civil servant has take pains to explain in his correspondence with HMRC and subsequently with the Tribunal (including in the Notice of Appeal) what he has done and why. I therefore give as full a consideration as I can to the points he has raised or queried.

37. The apparent delay in the notification of the appeal is 3 days. I consider that the appellant is wrong in thinking that the 30 days deadline expired on 10 June. 30 days from (ie after) 10 May is 9 June. This delay is however neither serious or significant and there is a good reason given for the delay, so I give permission for the appeal to be notified late, if it is necessary to do so.

38. I say this because it is not clear to me that a proper statutory review has been carried out. By completing the form SA634 the appellant made a request for a review. This was in response to the HMRC letter of 15 March 2017 which said that he could "ask us for a review of your case". The SA634 is headed "*Request* for Review of Decision" but doubt is caused by the fact that the only relevant box on the form which

the appellant could (and did) tick reads "I'd like to accept HM Revenue and Customs *offer* to review the decision to charge a late filing penalty". [My emphases.]

39. The Upper Tribunal, in *HMRC v NT-ADA Ltd* [2018] UKUT 59 (TCC) (Judge Roger Berner and Judge Sarah Falk (as she then was)) held that in the context of the VAT review provisions it was not necessary to analyse whether a review was offered or required (ie requested). In the VAT provisions however HMRC are obliged to offer a review. The decision did not deal with the income tax rules which are applied to these appeals by paragraph 21 Schedule 55 FA 2009). In sections 49A to 49I TMA there is a clear distinction between, and separate statutory provisions for, reviews which are offered and those which are requested, and it can be important to determine into which category a particular review falls. In my view this was clearly a request, notwithstanding the wording of the SA634 which leaves an appellant no option but to say that they were offered a review when they weren't.

40. By s 49B(1) TMA where a review is required by the appellant HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter. The relevant period for this notification starts on the day on which HMRC received the SA634 and ends 30 days later, or is such longer period as is reasonable. The 30 day period then started on 18 April 2017 (the date on the stamp on the SA634).

41. Where a review is required by the appellant, s 49B(1) also requires HMRC to review the matter in question in accordance with s 49E. Section 49E(6) requires HMRC to notify the conclusions of the review (which may be to uphold, vary or cancel "the view of the matter") and their reasoning for the conclusions within 45 days from the day when HMRC notified the appellant of HMRC's view of the matter or such other period as may be agreed.

42. The only communication from HMRC to the appellant after the SA634 was sent to HMRC was Ms Storey's letter of 10 May 2017. This letter is within 45 days of receipt of the SA634, but that is not what s 49E(6) is referring to. This letter is not the notification of the conclusions of a review within that subsection, because there is no trace of any "view of the matter" notification, and no suggestion in the documents that one was given. There is as yet no period falling within s 49E(6)(a) and none has been agreed within s 49E(6)(b).

43. By s 49D(2) TMA an appellant may notify their appeal to the Tribunal if they have given[1] notice of appeal to HMRC. There is no time limit for this notification unless, in a case where a review was requested, HMRC have given their view of the matter under s 49B. Here they haven't given that view, so the notification of the appeal was not out of time.

[1] It should be noted that "given" in this section is used in an unusual way. It does not mean "received" by HMRC, but means that not only has HMRC received it, but that they have not rejected it as given out of time, or if they have rejected it they have subsequently accepted that the appellant had a reasonable excuse for its being out of time – see s 49(1) to (3) TMA.

44. I look now at the amount of the penalties notified to the Tribunal. £700 is £900 less than the amount assessed, and £900 is the amount of the daily penalty. Why has the appellant not included the £900? The obvious reason is that Ms Storey told him she'd cancelled that penalty. What was the legal effect of saying that?

45. In this passage of my decision I am assuming that what Ms Storey conducted was a statutory review as the appellant's reaction was also based on that reasonable assumption on his part. Where a review is carried out of the matters in question, here the four assessments of penalties, the review officer may decide that each of them *is to be* upheld, varied or cancelled. In the case of the daily penalty she had the power to decide that the penalty assessment is to be cancelled. By s 49F TMA the conclusions of a review are to be treated as if they were an agreement in writing under s 54(1) TMA which cannot be resiled from. The conclusion on the daily penalty therefore had effect as if the tribunal had determined to cancel it under paragraph 22 Schedule 55 FA 2009.

46. That therefore is what Ms Storey must have meant when she said "I *have* cancelled the … penalty … of £900" [my emphasis] because she referred to the appeal being treated as settled on the basis of her conclusions.

47. But s 49F(4) TMA provides that s 49F(2) enacting the deemed s 54 TMA agreement, does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under s 49G TMA. This the appellant has done. Therefore, the deemed s 54 agreement never came into effect and the appeal against the daily penalty remained extant and capable of notification.

48. In the actual circumstances where there was no statutory review, there was no question of the daily penalty being cancelled by deemed s 54 TMA agreement, so the appeal against the daily penalty was still for that reason available for notification.

49. I do not blame the appellant for not realising this. But HMRC in their statement of case say that "the penalties total £700" (paragraph 1) and that "the daily penalties have since been withdrawn …" (paragraph 6). I do not understand how HMRC can think, in the absence of a s 54 TMA agreement, deemed or otherwise, a penalty can be unilaterally cancelled by HMRC.

50. I therefore deal with all the penalties.

Grounds of appeal and HMRC response

51. The appellant says by way of background to his grounds of appeal notified to the Tribunal on 12 June 2017 that HMRC had imposed a total of £2,640 in late filing penalties on him, in respect of two residential properties, in each of which he owned a one-third share. In the other case HMRC reduced the penalty from £840 to £100 and he is not appealing that case. In the present case he wishes to appeal the penalties of £700, but would drop his appeal if HMRC waived the £600 in penalties for being 6 months and 12 months late.

52. He also adds that he supports the tax on non-residents on chargeable gains on residential properties. But he objects to the method of collection (and I assume notification).

Grounds of appeal

5 53. His grounds of appeal are:

(1) It was unreasonable of HMRC to expect taxpayers living outside the UK (the only ones to whom it applied) to be aware of the new requirements outside the tax reporting cycle

(2) It was unreasonable of HMRC to exact penalties into the hundreds of 10 pounds for not respecting the requirement, all the more on those like him who fulfilled the requirement as soon as they became aware. Penalties on this scale are disproportionate given that no CGT was actually payable.

54. In support of ground (1) he says that the filing requirement was included in FA 2015. It was not mentioned in the Budget Statement or the Budget Book, and the 15 legislation was given Royal Assent within 2 weeks of the Budget because of the General Election, so he doubts if this requirement was specifically discussed in Parliament[2]. It was not mentioned in the self-assessment guidance notes for CGT issued in April 2015, which were the current notes when he sold the property in question.

55. He points out further that Ms Storey's review letter said that the new legislation 20 was announced in the Chancellor's 2013 Autumn Statement, but that statement made no mention of any filing requirement[3].

56. He adds what I take to be a further ground of appeal (see §8(2)) that enquiries have shown that even specialist conveyancers were not aware of the new filing requirements, so that he cannot accept that ordinary taxpayers could reasonably be 25 expected to know what specialists do not. He has asked HMRC what steps they took to ensure that solicitors and conveyancers were aware of the requirement but they have not replied. He pointed out that Land Registry forms make no mention of the requirement.

57. He also says that there is no logic in withdrawing the daily penalties but to insist 30 on the 6 month and 12 month penalties if daily penalties are not payable.

HMRC's response

58. HMRC's contentions as set out in their SoC dated 15 February 2018 are:

(1) The appellant confirms that he is non-resident for CGT purposes and has been for more than 20 years.

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[2] He is right – it wasn't.

[3] In fact the original procedure proposed by HMRC was withholding of tax by the purchaser (à la s 40 Development Land Tax Act 1976). For more information see my decision in *McGreevy v HMRC* [2017] UKFTT 690 (TC) at [31] to [36]

(2) It is not disputed that he sold a residential property during 2015-16.

(3) The appellant is the "appropriate person" to make a NRCGT return within the terms of the legislation.

(4) The return was submitted 380 days after the 30th day from the date of completion.

(5) Accordingly, paragraph 1 Schedule 55 FA 2009 applies and penalties under paragraphs 3, 5 and 6 of Schedule 55 are payable.

59. In response to the appellant's grounds of appeal HMRC say:

(1) Whether a person has a reasonable excuse depends on the particular circumstances in which the failure occurs. The test is to consider what a reasonable person who wanted to meet their tax obligations would have done in the same circumstances and decide if the action of the person met that standard.

(2) By reference to that test in this case the appellant's lack of awareness of the law is not a reasonable excuse, because it amounts to a claim that ignorance of the law can be an excuse. They cite this Tribunal in *Qualapharm Ltd v HMRC* [2016] UKFTT 100 (TC) in support of this proposition.

(3) The appellant had an obligation to stay up to date with legislation affecting his activities in the United Kingdom. A prudent person exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts, is expected by HMRC to have researched what is expected regarding their tax obligations. The appellant did not take care to avoid the failure to ensure the timely filing of the returns (*sic*).

(4) HMRC do not accept that they should have take much greater steps to made non-resident taxpayers and their representatives aware of the new requirement, and they cite in support *Welland v HMRC* [2017] UKFTT 870 (TC) ("*Welland*") at [107] and [108] (Judge Barbara Mosedale).

(5) There was "extensive" information available regarding the change of legislation, reference being made to the page on the Gov.uk website "Capital gains Tax for Non-Residents: UK Residential Property" available from April 2015 which "very clearly states that the deadline for reporting the disposal is 30 days.

(6) Paragraph 23(2)(b) Schedule 55 FA 2009 specifically precludes reliance on a third party unless the failure of the agent amounts to a reasonable excuse and the appellant could not have taken reasonable steps to meet their obligation. In this regard, HMRC say that submitting an NRCGT return does not require specialist advice that the appellant has to rely on, and that the use of specialist conveyancers does not impact on the obligation to submit a NRCGT return on time.

60. The next passage of the SoC says:

> "HMRC did not issue late filing penalties where a late CGT return was received by 7 May 2016. The penalties were suspended for the first year

> and 30 days of the operation of Non-Resident Capital Gains Tax to allow taxpayers and agents sufficient time to become familiar with them."

61. They go on to point out that the fact that no CGT is payable does not remove the requirement to make a return, unless the disposal was within s 12ZBA Taxation of Chargeable Gains Act 1992 ("TCGA"), that is where a no gain/no loss disposal within s 288(3A) TCGA resulted from the disposal.

62. In summary HMRC contend that the appellant does not have a reasonable excuse for the late submission of their NRCGT return.

63. HMRC next refer to the Upper Tribunal decision in *HMRC v Hok Ltd* [2012] UKUT 363 (TC) (Warren J and Judge Bishopp) to the effect that this tribunal does not have the power to amend a penalty because they think it unfair. They tell me that this decision is binding on me in all cases where similar issues are raised.

64. They also submit that the penalties are not disproportionate and the penalty regime is proportionate to its aim, citing *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158 and *Bysermaw Properties Ltd v HMRC* [2077] SpC 644 (Mr Malcolm Gammie CBE QC). The existence of both a 'reasonable excuse' and 'special reduction' provision reinforces the view that the penalties are not disproportionate.

65. As to the special reduction that HMRC may make, they say that "on the information held, including the appellant's contentions, HMRC do not consider that there are any special circumstances which were uncommon or exceptional that would allow the penalty to be further reduced".

Appellant's response to HMRC SoC

66. On 25 February 2018 the appellant responded. He criticised HMRC's formulation of his contentions as he said they had omitted an important point about the Land Registry forms, and he criticised what he called an "extraordinary triple negative" in their formulation of their view of his duties as a responsible taxpayer. He says that *Welland* does not support HMRC's case, and that *McGreevy v HMRC* [2017] UKFTT 690 (TC) (a case of mine) is the more relevant authority.

67. In relation to special circumstances he says they have ignored what *Welland* said about cases with multiple sales in quick succession. On the basis of *Welland* HMRC should waive the penalties in this case, or at least credit the £100 on the other disposal against the penalties here.

HMRC's response to appellant's response to SoC

68. On 7 March 2018 HMRC responded to the appellant's response. In this they distinguished the position in *Welland* as to multiple disposals from that in this case, saying two sales within 7 months is not "quick succession". They also said that there is no legal requirement to include warnings on the Land Registry forms.

69. They elaborated a bit more on the statements in the SoC about special circumstances in the SoC, saying HMRC have continued to consider special

circumstances since the appeal was notified, but still believe no reduction is justified. They say their decision on this is not flawed.

The appellant's response to HMRC's response to appellant's response to SoC

70. On 15 March 2018 the appellant replied. It was not his point that there was a legal requirement to include a warning on the Land Registry forms. The question is whether, when HMRC did not do so, it was reasonable for the seller of land to know about the obligation.

71. He also says that on the *Welland* issue HMRC responded to an argument he was not making.

72. Finally[4] the appellant sent to HMRC including the complier of the SoC and copied to the Tribunal, a letter he wrote to the NRCGT team about the disposal of a property in Surrey by the executors of his father's estate, one of the three of whom is him, a non-resident, while the other two, are resident in the UK as was his father. He explains that he made enquiries as a result of bitter experience about whether there is a requirement on him or the executors to make an NRCGT return because of his non-residence. He says that he was passed from the non-resident CGT team to the CGT helpline to HMRC's Trusts Service to HMRC's Estates service who came to the same conclusion as him, that there was no liability. But he mentioned that the officer in the Estates service had never heard of the NRCGT return requirement.

73. I have taken all of the points raised into account, and I hope to have dealt with all of them and any that the appellant has raised earlier in this decision, but failure to mention any particular point does not mean I have not considered it.

Discussion

The issues and the burden of proof

74. There are two main issues in this, as in most penalty cases. The first is whether the penalty was correctly and validly imposed in accordance with any requirements of the law. The second arises if the penalty was correctly imposed and is whether there is any provision in the law that allows the person assessed to argue that the penalty should not have been imposed at all (or in a lesser amount).

75. HMRC rightly recognise that it is for them to show that the penalty was correctly imposed and that it is for the appellant to show that there is a reason why the penalty should not have been imposed.

Was the penalty correctly imposed?

76. In my opinion HMRC have to show that:

[4] Having suppressed my inclination to say, at least in the body of the decision, "this correspondence must cease" or "(That's enough – Ed)"

(1) the obligation to make a return and the failure to make it within the time specified fell within the Table in paragraph 1 Schedule 55 FA 2009 at the time of the failure.

(2) the appellant was a person with the obligation and was not excepted from the obligation by any provision of law (apart from one requiring a claim).

(3) an assessment was made and was within the time limit laid down by law.

(4) notice of the assessment was given to the appellant.

(5) that notice stated the period in respect of which the penalty was assessed.

(6) that notice explained the appellant's appeal rights

The obligation

77. By paragraph 1(1) Schedule 55 a penalty is payable by a person who fails to make or deliver a return specified in the Table in that paragraph on or before the filing date, the date by which it is required to be made or delivered.

78. The Table contains at item 2A an NRCGT return under s 12ZB TMA. This item was inserted by paragraph 59(1) Schedule 7 FA 2015 with effect from 26 March 2015, and by paragraph 59(2):

> "… Schedule [55], as amended by sub-paragraph (1), is taken to have come into force for the purposes of NRCGT returns on the date on which this Act is passed."

79. That day was 23 March 2015. As a result Schedule 55 so far as it applied to a failure described in item 2A was in force at the time of the failure to deliver an NRCGT return on or before the filing date.

80. The filing date for an NRCGT return is the 30th day following the day of completion of the relevant disposal, which in this case is, according to the details of the screenshot of the NRCGT return in the bundle of papers I had, 4 September 2015, making the filing date 4 October 2015. I find that the return was therefore late as it was delivered electronically on 18 December 2016.

Was the appellant a person with the obligation to file an NRCGT return?

81. Section 12ZB TCGA provides:

> "(1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and 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, …"

82. A "non-resident CGT disposal" is defined in s 14B TCGA to mean:

> "(1) For the purposes of this Act a disposal made by a person is a "non-resident CGT disposal" if—

(a) it is a disposal of a UK residential property interest (within the meaning given by Schedule B1), and

(b) condition A or B is met.

But see also subsections (5) and (6).

5 (2) Condition A is—

(a) in the case of an individual, that the individual is not resident in the United Kingdom for the tax year in question (see subsection (3)),

…

10 (3) In subsection (2)—

(a) "the tax year in question" means the tax year in which any gain on the disposal accrues (or would accrue were there to be such a gain);

…

15 (4) Condition B is that—

(a) the person is an individual, and

(b) any gain accruing to the individual on the disposal would accrue in the overseas part of a tax year which is a split year as respects the individual.

20 …"

83. The evidence relevant to this issue in the bundle consists of:

(1) The screenshot of the NRCGT return.

(2) The income tax return made by the appellant for 2015-16. On page TR2 there are entries in the "Yes" box in relation to "UK property", "Foreign", 25 "Capital gains summary" and "Residence, remittance basis" (against which the appellant has inserted the words "for CGT" underlined after the words "not resident".

(3) The SA106 (foreign) pages which show details of dividends from foreign countries.

30 (4) The capital gains pages (SA108) on which a gain of £6,325 is reported, with additional information in box 38 about the sale and a reference to NRGT (*sic*) return with the reference number. Box 38 has in handwriting before it "N/R for CGT purposes".

(5) The SA 109 (Residence etc) pages show that the appellant in answer to the 35 wording:

(a) at box 1 "If you were not resident in the UK for 2015-16, put 'X' in the box" has put such an 'X' and has added "Ordinary sense of 'resident') Resident for income tax" (his underlining).

(b) At box 4 "If you were resident in the UK for 2014-15, put 'X' in the 40 box" has put such an 'X' and has added "For income tax purposes".

(c) At box 18 and 19 has show he was resident in Belgium.

(d) At box 40 "Any other information" has given a lengthy explanation of the other entries.

84. The explanation at Box 40 says that he is resident in Belgium in the sense that is where he lives, sleeps etc, but by virtue of his employment as a civil servant working for the EU Institutions (from 1996) he is UK resident for income tax purposes. As a result has made income tax returns for 20+ years and does not pay income tax in Belgium.

85. But for CGT purposes the appellant says he is not resident in the UK, and that he has a letter from his Inspector of Taxes in the Inland Revenue confirming this, plus later advice. He had not included these with the return (he has since supplied them to the Tribunal and they are considered below).

86. He also gave the legislative foundation for his statement on his UK residence position, Article 13 of Protocol 7 to the Treaty on the Functioning of the European Union ("TFEU").

87. In their SoC HMRC say:

> "36. The appellant confirms they (*sic*) have lived abroad for more than 20 years. It is not disputed that the Appellant disposed of a property at 7 Halls Farm Close … during the tax year 2015/16 and that they (*sic*) were non-resident for the year. On page 57 of the document bundle he (*sic*) confirms he is non-resident for CGT purposes."

88. In the normal run of things I would of course accept that an appellant who made an NRCGT return and insisted that he was not resident for the purposes of s 14B(1)(b) and (2) TCGA 1992 (Condition A) did have an obligation to make a return, if all other conditions for there to be an NRCGT disposal were met, as they seem to be here. But I find the state of legal affairs the appellant says applies to him so strange and counter-intuitive that I have thought it necessary to consider whether it really is the case that the appellant in his circumstances is under the obligation to make a return under s 12ZB TMA.

89. In UK tax law the question of residence for direct tax purposes is governed by Schedule 45 FA 2013, paragraph 1 of which says:

> "(1) This Part of this Schedule sets out the rules for determining for the purposes of relevant tax whether individuals are resident or not resident in the UK.
>
> (2) The rules are referred to collectively as "the statutory residence test".
>
> (3) The rules do not apply in determining for the purposes of relevant tax whether individuals are resident or not resident in England, Wales, Scotland or Northern Ireland specifically (rather than in the UK as a whole).
>
> (4) "Relevant tax" means—

(a) income tax,

(b) capital gains tax, and

(c) so far as the residence status of individuals is relevant to them) inheritance tax and corporation tax.

(5) Key concepts used in the rules are defined in Part 2 of this Schedule."

90. The Schedule therefore applies for the purposes of both income tax and CGT, so that a person cannot be resident or not resident for one tax but not the other. Schedule 45 FA 2013, commonly called the "statutory residence test" or "SRT", replaced the mixed bag of (exiguous) statute law[5], (ample) case law and guidance[6] that defined residence for income tax and also, by virtue of s 9(1) TCGA as it stood before the introduction of Schedule 45 FA 2013, for the purposes of the TCGA. Section 9(1) said:

> "(1) In this Act "resident" and "ordinarily resident" have the same meanings as in the Income Tax Acts."

91. Thus at the time the appellant received his ruling from the Inland Revenue as well as at the time of his obligation to make a return (assuming he had one) it was a meaningless concept in UK domestic law for someone to be resident for income tax purposes, but not resident for CGT purposes.

92. The appellant says that he is, by the SRT resident in Belgium, but because of his employment by the EU institutions he is treated as resident in the UK for income tax purposes but not for CGT purposes. For this proposition he refers, as previously mentioned, to Article 13 of Protocol 7 to the TFEU. That Protocol is headed "On the Privileges and Immunities of the European Union".

93. Chapter V of the Protocol deals with "officials and other servants of the EU. Article 12 says:

> "Officials and other servants of the Union shall be liable to a tax for the benefit of the Union on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned.
>
> They shall be exempt from national taxes on salaries, wages and emoluments paid by the Union."

94. Because of this article the appellant says in his return that he is not liable to UK tax on his employment income derived from employment with the European Commission or other EU institutions. That is clearly right.

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[5] Most of which was simply an updating in language of provisions in the Income Tax Act of 1803 (43 Geo III c. CXXII) (see sections 85 and 86)

[6] In particular booklet IR20 discussed at length by the Supreme Court in *R (oao) Davies and another v HMRC* [2011] UKSC 47

95. Article 13 says:

> "In the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Union, officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Union. This provision shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.
>
> Movable property belonging to persons referred to in the preceding paragraph and situated in the territory of the country where they are staying shall be exempt from death duties in that country; such property shall, for the assessment of such duty, be considered as being in the country of domicile for tax purposes, subject to the rights of third countries and to the possible application of provisions of international conventions on double taxation.
>
> Any domicile acquired solely by reason of the performance of duties in the service of other international organisations shall not be taken into consideration in applying the provisions of this Article."

96. Both HMRC and the appellant seem to have clearly accepted that the Protocol has direct effect in member states and that either domestic legislation must be interpreted so as to give effect to the Protocol or it must be disapplied to the relevant extent. I do not, and cannot, disagree.

97. Because neither party sought to rely on Article 13 to support its own case and because if it was relevant it would have direct effect and I would have no option but to apply it, I asked the parties for comments on my provisional views, which I gave to them, of what Article 13 meant for this appeal and my reasons for saying so.

98. The appellant commented. In his emailed response he said:

> "Although the letters are now 20 years old the Treaty language has not changed and I have relied on them since then and have in some intervening tax returns made explicit reference to my understanding of my tax position which has never been questioned. I have also understood from tax advisers in Brussels, who occasionally give talks on these matters (even if I have never engaged them personally), that this is the accepted position of UK officials in the European institutions. That is a few hundred people, at least.
>
> I am not seeking to have the NRCGT penalty overturned on the basis that I am in fact resident for CGT purposes but on the reasonableness of the penalty, in line with the multiple other cases that have been brought

> (McGreevy et al). I do not see that, for these purposes, my situation distinguishes me from any more 'normal' non-residents.
>
> I would find it surprising if the tribunal were to rule in this case on an entirely different question, although I do not claim any expertise on what the powers of the tribunal are.
>
> Certainly I (and no doubt others) have organised my affairs according to the understanding of the position outlined above and surely have legitimate expectations that would need to be respected if the interpretation were to change, in the same way as expectations as to CGT liabilities were respected by the legislation when NRCGT came into force (capital gains only from 6.4.2015)."

99. I need to make a number of points in reply.

100. Normally I would not consider an argument that the appellant had not and did not wish to run, even if the reason was ignorance that the argument was available. But in 2018 the TFEU, by virtue of the European Communities Act 1972, still applies and has supremacy over inconsistent UK law, and I cannot ignore it once it has been drawn to my attention.

101. I will still consider the excuses the appellant puts forward, and have done so later. He may be guilty of assuming that because it is me who is dealing with his appeal, something he would have discovered from my directions, his arguments would be bound to succeed. But he cannot know whether I have found against other appellants in unpublished cases. And obviously I consider, as I must, each case on the basis of its particular facts and circumstances.

102. He refers to a few hundred people who are UK officials in the European institutions. This issue is then of wider import than just to him. Some of them will no doubt have already disposed of assets in the UK to which the NRCGT rules applied, and their appeals may not yet have been considered by the Tribunal or even made: others may be about to dispose of UK properties. These people (including him) are, when made subject to a substantial penalty, entitled and required to be dealt with by both HMRC and this tribunal in accordance with the law (and in that I include article 6 of the European Convention on Human Rights).

103. My decision may affect the appellant and the other few hundred to their advantage if they are nor liable to the NRCGT Schedule 55 penalty. My decision may also affect the appellant and the others to their disadvantage. If they considered that they were not resident for CGT purposes because of HMRC rulings they may have disposed of assets situated both in the UK and overseas thinking they were exempt from that tax. I think though it is unlikely in the extreme that HMRC would seek to enforce any such liabilities, or a fortiori penalties, in the face of their own rulings.

104. But my decision may also affect others, if not the appellant, to their advantage in other ways than just freedom from NRCGT penalties. If losses had been made on disposal of assets they would not, as non-residents on the basis of the SRT, have been able to have set them against future gains that might arise were they to have resumed

residence in the UK, or to have set them against income in the same year eg under s 131 Income Tax Act 2007 (share loss relief).

105. But in any event as a decision of the First-tier Tribunal my decision is of no precedent value, deciding as it does only the appellant's appeal. And of course its future effect in relation to article 13 will be short lived, given the European Union (Withdrawal) Act 2018, especially s 1.

106. But the fact remains that nothing in the appellant's comments suggests that the Article does not apply to him. HMRC did not wish to comment. I take that as an unwillingness to defend the ruling they have given. Despite that I consider the ruling to see if it can show that my initial views on the meaning of the Article are wrong.

107. The ruling, dating from 1996, said:

> "I can advise you that in accordance with Article 14 [now 13] of the protocol … an individual who is ordinarily resident in the United Kingdom who goes abroad to take up EC [now EU] employment in a member country (sic) remains ordinarily resident in the United Kingdom for the purposes of United Kingdom income tax but not for capital gains tax."

108. In 1998 in response to a query from the appellant Inland Revenue (FICO) said:

> "… my colleague advises as follows:-
>
> > 'If the taxpayer is meeting all of the conditions at Paragraph 2.2 of leaflet IR20 … then for capital gains tax purposes only, he would be treated as not resident and not ordinarily resident.'
>
> When he completes the non-resident pages of the Tax Return, if the help notes point to not resident/not ordinarily resident status, then he should tick the NR/NGT boxes but put a note in the note space saying 'for income tax purposes regarded as resident/ordinarily resident as a European Community official'."

109. From this it can be seen that the Inland Revenue must have accepted that article 13 (14 as it then was) had direct effect in UK law so as to make the appellant resident for income tax purposes when he was not resident under domestic law. But why did that ruling not apply to CGT? It is very difficult to see, given especially s 9 TCGA, how the Inland Revenue thought that the article should disapply UK law or what they thought that law should be read as saying when the article has effect.

110. The Inland Revenue must, I think, have looked at the wording of the article and made the assumption that in a part of the Treaty of Rome (as the TFEU then was) the words "income tax" must bear the meaning they have in each member state and do not have an autonomous EU meaning. This is a startling proposition, which flies in the face of decisions of the Court of Justice of the European Union ("CJEU"), such as Case C-571/10 *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others (Associazione Porte Aperte/Offene Türen, intervening)* [2013] All ER (EC) 125 ("*Kamberaj*"), where at [76] – [79] the CJEU said:

> "76. It is true that, in the light of the settled case law of the court, the phrase 'as they are defined by national law' constitutes, in principle, an obstacle to the adoption of a single independent interpretation of European Union law of the concepts of social security, social assistance and social protection for the application of art 11 of Directive 2003/109.
>
> 77. According to that case law—
>
> > '[t]he need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.'
>
> That means, a contrario, that a provision of European Union law which contains an express reference to the law of the member states cannot, in principle, be the subject of such an independent and uniform interpretation.
>
> 78. However, the court examines attentively the exact wording of the reference made to national laws in order to circumscribe precisely the margin for manoeuvre left to the member states. Thus, for example, it held, as regards the right to paid annual leave laid down in art 7(1) of Council Directive (EC) 93/104 (concerning certain aspects of the organisation of working time) —
>
> > '[t]he expression in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice must … be construed as referring only to the arrangements for paid annual leave adopted in the various Member States [without the latter being entitled] to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever.'
>
> 79. Furthermore, the court attaches more importance to an autonomous interpretation where the terms of the reference to the laws of the member states are general and when such an interpretation is necessary in order to safeguard the objective intended by a rule of European Union law."

111. Contrary to the provision being interpreted in *Kamberaj* which do contain the phrase "as they are defined by national law", that phrase does not appear in art 13 of Protocol 7. And it seems to me that that is for a very good reason. A quick canter through the articles in the UK's double taxation conventions with other member states that describe the taxes covered by the agreements shows that in only two states is there a reference to "capital gains tax", the UK and Ireland. The Convention with Portugal refers to a specific tax on gains, but in no other treaty with a member state is there a reference "capital gains tax" or a tax on gains from the disposal or alienation of assets separate from a tax on income. And that is not because such states do not tax disposals that fall within the scope of the UK's CGT.

112. And those conventions with other member states refer to their being conventions for the avoidance of double taxation "on Income and Capital", not "Capital Gains". "Capital" there included taxes on capital, such as wealth taxes, not taxes on the

alienation of assets. The two matters are dealt with in separate articles of those conventions and in the OECD Model Convention which is headed "with respect to Taxes on Income and on Capital."

113. Article 13 of Protocol 7, as well as applying to the application of income taxes, applies to the application of double taxation conventions. Thus taking the UK-Belgium convention as the one applicable to the appellant, it seems to me that he is resident for the domestic tax purposes of UK and Belgium in both territories, as art 13 does not say that the civil servant is not to be treated as resident in Belgium or wherever he works for an EU institution. Given what he says in Box 40 on SA109 it is likely that he is to be treated as a resident of Belgium but not of the UK for the purposes of the convention by virtue of art 4(2)(a), part of the tie-breaker provisions for dual residents. Does that affect the question of liability to tax on capital gains? Article 13(1) of the convention with Belgium says:

> "Article 13 Capital gains
>
> (1) Gains derived by a resident of a Contracting State [Belgium] from the alienation of immovable property referred to in Article 6 of this Convention and situated in the other Contracting State [UK] may be taxed in that other State [UK]."

114. That gives the UK the right to tax gains arising from the disposal of UK land on residents of Belgium. But whether that right applies to enable the appellant to be taxed depends on the terms of the UK legislation. "Resident of a contracting state" in art 13 of the Convention is a term of art, closely defined in the convention, and has no bearing on whether art 13 of Protocol 7 applies or not. As I read art 13 of that Protocol it overturns, where relevant, the operation of the tie-breaker to make someone in the appellant's position a resident of the UK for the purposes of the convention. That does not contradict, indeed its supports, the view shared by the appellant, HMRC and me, that the appellant had worldwide lability to income tax (save for his EU remuneration). And equally nothing in Protocol art 13's application to the convention can affect its operation on UK domestic law.

115. It is probably unnecessary to go further, but it is perhaps worth pointing out that the UK's narrow view of what is income tax in the article would lead to some strange consequences when it comes to "death duties", as the UK has no such tax of that name and never has had. It has inheritance tax and had estate duty from 1894 and a number of other duties before that such as succession duty and legacy duty. In HMRC's view then the article cannot apply.

116. The use of a term like "death duties" reinforces my view that the terms in art 13 of the Protocol are generic EU wide ones and are not to be interpreted in the narrow way that HMRC has.

117. In my view it is not arguable that the article does not have an autonomous EU meaning. Such an autonomous meaning must include taxes which are imposed on the disposal of assets and which are part of the taxes on other types of income. The effect of the article then is to make the appellant resident in the UK for all the purposes of

direct taxation, and in my view that must include s 14B TCGA. It is *acte clair* and does not need referring to the CJEU.

118. For all these reasons I hold that the appellant was a UK resident for the purposes of the SRT including for capital gains tax, and that article 13 Protocol 7 does not disapply the SRT for the purposes of that tax.

119. Accordingly, whatever his protestations he was not required to complete and deliver an NRCGT return within 30 days of the completion of the sale of the asset, and so did not fail to meet an obligation for which Schedule 55 FA 2009 provided a punishment. The penalties cannot stand. But out of deference to the appellant's point of view, and in case I am wrong about the effect of the article, I go on.

Was there an exception from the obligation to file?

120. Section 12ZBA TMA provides that there is no obligation to file if the disposal is a disposal where, by virtue of any of the no gain/no loss provisions in s 288(3A) TCGA, neither a gain nor a loss accrues. But that section also provides that an election may be made to make a return nonetheless, but that such a voluntary or elective return is not one to which paragraph 1 Schedule 55 applies

121. In the SoC HMRC refer to this provision and "contend" that in determining whether a gain or loss is made it is necessary to consider allowable deductions as well as the amount of consideration for the disposal[7]. They further contend that a disposal in the open market for neither gain nor loss cannot be a no gain/no loss disposal within the s 288(3A) provisions, so consequently s 12ZBA does not apply here.

122. I am at something of a loss to understand why they make this contention. The returning of a gain, which is what the appellant has done, is clear evidence that that return was not an elective one within s 12ZBA, and I so find.

Was an assessment made and if so was it in time?

123. HMRC has produced no evidence showing that the penalty assessment itself was actually made and by whom, or of the process by which the assessment was made. I have a document (see §§4 to 7) demonstrating that a *notice* of assessment was given to the appellant by HMRC.

124. The appellant did not suggest the assessment had not been made, nor put HMRC to proof that it had, unlike in *Corbally-Stourton v HMRC* [2008] SpC 692 (Special Commissioner John Clark). In my view the presumption of regularity applies in such a case and I assume that by HMRC's issuing a notice of an assessment it follows that an assessment was in fact made.

[7] Who'd have thought it? The only faint reason I can think of for this "contention" at this stage of the SoC is that the s 288(3A) provisions are all ones which deem the consideration for the disposal to be such amount as would secure that no gain or loss accrues, and that is obviously done by deeming the consideration to be equal to the allowable deductions.

125. I find that the assessment was made on (or possibly before) 1 December 2016 (that being the date of the notice, which is not necessarily the day the assessment was made). That date is less than two years from the filing date so by virtue of paragraph 19(2)(c) Schedule 55 FA 2009 it was in time, and I so find.

Was notice properly served?

126. The notice was sent to the appellant at the address from which he acknowledged receipt, the lack of diacritics in the street name not seeming to be a problem for Bpost. I find that it was duly served by post within the meaning of s 115(2) TMA.

Did it state the correct period in respect of which the penalty was assessed?

127. On the second page of the notice is a box which reads:

> "You have been charged penalties for the period from 4 October 2015 to 18 October 2016.
>
> A £100 fixed penalty
>
> Paragraph 3 of Schedule 55 to the Finance Act 2009.
>
> A daily penalty of £10 per day for the maximum of 90 days. This is for the period from 3 January 2016. For 90 days.
>
> Paragraph 4 of Schedule 55 to the Finance Act 2009.
>
> …"

There is no reference to a tax year.

128. Paragraph 18(1)(c) Schedule 55 requires a notice of assessment to

> "state … the period in respect of which the penalty is assessed".

129. In *Eric Scowcroft v HMRC* [2018] UKFTT 295 (TC) ("*Scowcroft*") at [67] to [114] I discussed the period issue at some length, and I will not repeat it. My conclusion in relation to a paragraph 3 Schedule 55 penalty was that the notice of assessment in that case did not comply with paragraph 18(1)(c) and I hold the same to be the case here for the reasons I gave in *Scowcroft*, that what is required is the year of assessment of the disposal. In *Scowcroft* though I held that s 114(1) TMA cured the error, and that also applies here, and to the paragraph 5 and 6 penalties.

130. But paragraph 4 penalties are different. The Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 646 ("*Donaldson*") so held. It is worth setting out some of what Lord Dyson MR (giving the only reasoned judgment) said on the paragraph 18(1)(c) issue:

> "*Paragraph 18(1)(c)*
>
> 24. Mr Vallat's primary submission [for HMRC] is that the "period in respect of which the penalty is assessed" is the tax year to which the assessment relates (in this case 2011/12). This was stated in the notice. He points out that para 18 applies for the assessment of all penalties under the Schedule. There are no introductory words such as "where appropriate" which might suggest that a period need only be specified

> for some penalties. In some instances (for example, penalties payable pursuant to paras 3 and 8), the only possible "period in respect of which the penalty relates" is the tax year or other period to which the penalty relates.
>
> 25. I do not accept Mr Vallat's submission. It is true that in some contexts the phrase "period in respect of which the penalty is assessed" is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the period over which the penalty has been incurred. It would have been surprising if Parliament had not intended that HMRC should notify P how a daily penalty has been calculated i.e. over what period he has incurred the penalty. He needs that information to enable him to decide whether to challenge the assessment of the penalty.
>
> 26. The next question is whether the notice of assessment in this case did state the period in respect of which the daily penalty was assessed. It undoubtedly did not state the start or the end dates of the period. It stated that Mr Donaldson was liable for the maximum penalty of £900 calculated at the rate of £10 per day for a maximum of 90 days. It also referred him to para 4 of the Schedule. In my view, this was not sufficient to satisfy the requirements of para 18(1)(c). The notice did not identify the three month period. Referring him to para 4 of the Schedule (as the notice did) did not enable him to work out (still less by doing so did the notice state) to which three month period it was referring. As I have said at para 8 above, this seems to have been the view of the UT. The notice should have specified the three month period, at least by stating when it started. It should not be a cause for surprise that Parliament intended that the taxpayer should be told not only the amount of the daily penalty, but how it has been calculated i.e. the start and end date of the three month period."

131. What is clear from these extracts is that, rather surprisingly to my mind, where paragraph 4 penalties are imposed, there is an obligation in paragraph 18(1)(c) to inform the taxpayer of the period over which the daily penalties run, but not apparently to inform them of the tax year to which the penalty relates and thus the tax year for which the return was required.

132. In this case the notice of assessment meets the requirements set out in *Donaldson* as it clearly states the latter date for daily penalties and says they run for 90 days.

133. I hold then that the notice of all the assessments meets the requirement of paragraph 18(1)(c) Schedule 55 FA 2009, though for paragraphs 3, 5 and 6 s 114(1) TMA is required to validate the error in the period.

134. But in relation to paragraph 4 penalties there is a further condition relating to the period. By paragraph 4(1)(c) the notice must specify the date from which the period of 90 days taken into account in arriving at the amount of the penalty runs. The paragraph 4(1)(c) period in the notice of assessment is shown as the period of 90 days from 3 January 2016. Under paragraph 4(3) Schedule 55 the date specified may be earlier than the date the notice is given, which it is here, but must not be earlier than the end of the period beginning with the penalty date (paragraph 4(3)(b)). The penalty date is defined

by paragraph 1(4) Schedule in relation to an item 2A (NRCGT) return as the date on which a penalty is first payable for the failure to deliver the return, and says that it therefore means the day after the filing date. That date is the date by which the return is required to be made or delivered to HMRC, and by s 12ZB(6) TMA is the 30th day following the completion date. In this case the completion date was 4 September 2015 (as shown in the return). 30 days from then is 4 October 2015, so the penalty date is 5 October 2015. Three months from then is 5 January 2016.

135. But the date on the notice of assessment is 3 January. It seems that what HMRC may have done is count 90 days from the penalty date instead of the 3 months required by paragraph 4(1)(a). The date given is therefore earlier than the permitted date. Since paragraph 4(3) is clear and must have been intended to prevent a daily penalty running from a date before the end of the 3 months in which a person is not in danger of incurring one I do not think that this error can be rescued by s 114 TMA. It therefore invalidates the paragraph 4 penalty.

Cancellation (twice) of the paragraph 4 penalty

136. I have discussed above (§§44 to 49) the purported cancellation of the paragraph 4 penalty. The appellant has taken that cancellation as demonstrating an illogicality by HMRC towards the later penalties under paragraphs 5 and 6, so it is worth trying to get to the bottom of the matter.

137. Why did Ms Storey cancel the paragraph 4 penalty? At §19 I relate that she said that HMRC had reviewed its position following representations from a number of customers and agents, and that as a result HMRC would no longer be issuing daily penalties and past daily penalties were in the process of being withdrawn. She does not say why.

138. In the SoC HMRC say that it was because, in respect of these particular penalties, HMRC were not satisfied that they had satisfied the requirements of paragraph 4(1)(c) FA 2009 (*sic*). I have held that in this case they have not specified the correct date because the date is one before the end of the 3 month period from the penalty date. So presumably the NRCGT computer is programmed wrongly.

139. In other cases I have speculated that the reason is that paragraph 4(1)(b) has not been met.

140. I would cancel the paragraph 4 penalty (had I held the appellant to be an appropriate person) on two grounds. It does not meet the requirement in paragraph 4(1)(b) that HMRC have notified their intention to charge a daily penalty in this case, because the committee of HMRC officials referred to in Donaldson could not have had Item 2A penalties in mind because they did not exist at the time that committee decided to impose a penalty in every case. It does not meet the requirement in paragraph 4(1)(c) because the date given is before end of the relevant period.

Paragraph 5 and 6 penalties

141. In *Duncan Hansard v HMRC* [2018] UKFTT 292 (TC) at [82] to [94] I cancelled these penalties because HMRC put forward no evidence to show that an officer of

HMRC considered, as they were required to by paragraph 24 Schedule 55 FA 2009, what the penalty should be by reference to their best of information and belief. But here the penalties were imposed after the return was filed, as they have to be in NRCGT cases as HMRC will not know that a return is due, and in this situation paragraph 24 does not apply.

Did the appellant have a reasonable excuse?

Approach of the Tribunal to this issue

142. The Upper Tribunal in the case of *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") has given guidance to the First-tier Tribunal to the approach to be taken to claims that an appellant has a reasonable excuse for a failure to file on time.

143. At [81] it says:

> "When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

144. It can be seen from the grounds of appeal at various stages (initial appeal, review and notification to the Tribunal) that the appellant is putting forward two basic grounds for his having a reasonable excuse for his admitted failure:

(1) That he could not be expected to know of the new requirements to make a NRCGT return, and that his actions, or non-actions, were those of the reasonable person acting in the way HMRC say such a person should.

(2) That he would have expected the person doing the conveyancing to inform him of any relevant tax obligations

If either is established that is sufficient.

Was the appellant's lack of knowledge a reasonable excuse?

5 145. The appellant says in effect that he personally could not have been expected to know or take steps to find out about his obligation and that his actions or omissions in that regard were those of a reasonable person ordinarily wishing to meet his tax obligations.

146. HMRC in the SoC have put forward as the criterion or test by which the 10 appellant's excuse is to be judged as being "to consider what a reasonable person who wanted to meet their tax obligations would have done in the same circumstances and decide if the action of the person met that standard." They, and the review officer Ms Storey, have thankfully not sought to support the original letter in response to the appeal with its mistaken reference to unusual events etc.

15 147. What the SoC says is a rewriting in HMRC's own words of what Judge Berner said in *Barrett v HMRC* [2015] UKFTT 329 ("*Barrett*") at [154]:

> "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 20 regarded as conforming to that standard."

148. I do not think HMRC's embellishment by reference to the taxpayer wanting to meet their tax obligations adds anything material. A taxpayer who did not want to meet their tax obligations would clearly not be a reasonable one.

149. HMRC say in their SoC that a reasonable taxpayer in the appellant's 25 circumstances, that of a person who had become non-resident and who sold a residential property in the UK, would have:

(1) stayed up to date with legislation affecting their activities in the UK

(2) researched what is expected regarding their tax obligations

(3) consulted HMRC's website because it clearly showed that a return was 30 required within 30 days of completion.

150. In my judgment HMRC's formulation of what a reasonable taxpayer should do is a wholly unrealistic counsel of perfection. I cite again what Judge Berner said in *Barrett* at [161]:

> "The test is one of reasonableness. No higher (or lower) standard 35 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 40 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."

151. At [160] Judge Berner rejected HMRC's suggestion (referred to at [158]) that because the appellant there was a sub-contractor who had some knowledge of the CIS scheme as a recipient of payments, that awareness of the scheme should have put a reasonable taxpayer on enquiry as to his obligations as a contractor under the same scheme and he should have made specific enquiries with an accountant or with HMRC.

152. In this case the appellant had no such familiarity with the NRCGT rules, and absolutely no reason to be put on enquiry about them.

153. But HMRC have played what they see as their trump card, that ignorance of the law is no excuse, citing what Judge Mosedale said in a 2016 case on Schedule 36 notices, *Qualapharm*. In my decision in *McGreevy* I said that the maxim that ignorance of the law is no excuse was not an absolute rule. In some subsequent decisions such as *Hesketh and another v HMRC* [2017] UKFTT 871 and in *Welland* itself (which HMRC cite here in support of another matter) and in *Hart v HMRC* [2018] UKFTT 207 Judges Barbara Mosedale and Guy Brannan have disagreed with me.

154. But in *Perrin v HMRC* [2018] UKUT 156 at [82] the Upper Tribunal, seeking to give some guidance on an issue that has divided judges of this Tribunal as they are encouraged to do[8] said on this subject:

> "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. 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. The Clean Car Co itself provides an example of such a situation."

This seems to me to make the 15 March 2017 letter from the NRCGT team that ignorance of *basic* law is no excuse a correct statement of the position, and that in the SoC too sweeping.

155. What basic law is in issue in a penalty case? In my view failure to carry out the obligation, when required by notice to do so, to make and deliver a tax return under s 8(1) TMA is a basic law, one that in the words of *Perrin*, is well-known, simple and straightforward. A claim by a person that they did not know about this provision of the

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[8] see Lord Carnwath in *Jones (by Caldwell) (Respondent) v First Tier Tribunal (Respondent) and Criminal Injuries Compensation Authority (Appellant)* [2013] UKSC 19 at [41].

law would be very unlikely to be accepted as a reasonable excuse in this Tribunal. In another case, *Robertson v HMRC* [2018] UKFTT 158 (TC), I held that ignorance of the High Income Child Benefit Charge was not a reasonable excuse. This was because there has been lots of publicity such as to make it a "water cooler" topic. By contrast in *Barrett* at [164] Judge Berner said:

> "In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question …"

156. The filing obligation in question was that of returns of payments made to subcontractors under the Construction Industry Scheme Regulations 2005. In *Clean Car Co Ltd v Commissioners of Customs and Excise* the law of which the appellant was ignorant was regulation 26 of the Value Added Tax (General) Regulations 1985.

157. I do not classify the requirement to make an NRCGT return as basic law that can reasonably be expected to be known by everyone who falls within its ambit. In my view it is more arcane, less well known, less simple and straightforward than that in s 8 TMA and as equally obscure as the law in *Barrett* and *Clean Car Co*, if not more so.

158. HMRC say that they did not issue late filing penalties where a late CGT return was received by 7 May 2016 (in other words where the date of completion fell in the year 2015-16, the first year that the liability to tax and the requirement for the return existed. The reason for this was "to allow taxpayers and agents sufficient time to become familiar with them".

159. But why would they need a year to become familiar with a simple system about which information was clearly available from April 2015? And how would taxpayers potentially affected by the legislation who were not up to date with the outer reaches of FA 2015 but who were disposing, like the appellant, of a property in 2015-16 know they needed to be familiar? This "amnesty" amounts to HMRC admitting that the system was obscure and unfamiliar.

160. I consider, applying the test in *Perrin* at [82], that it was objectively reasonable for the appellant to have been ignorant of the requirement to make an NRCGT return in his circumstances. I therefore hold that he had a reasonable excuse for his failure to file the return on time, and on that account would have cancelled the penalty had the appellant been an appropriate person.

Can the appellant rely on a third party?

161. The appellant said in his first letter that was he expecting to be alerted to the requirement to file the return by the conveyancing firm he used. That amounts to reliance on a third party to alert the appellant to his obligation. The review conclusions letter from HMRC did not deal with this issue at all. The SoC deals with it in one paragraph where it says that it remained the appellant's responsibility to submit the return regardless of whether they have delegated the task. The appellant did not delegate the task to the conveyancing firm, because he was unaware of the requirement, so he could not delegate it.

162. There follows an allegedly complete sentence which I find utterly bamboozling:

> "Unless the failure of the Agent when considered in the light of all the circumstances amounts to a reasonable excuse and the Appellant could not have taken reasonable steps to meet their obligation."

163. What is meant to be the consequence if the failure of the agent does amount to a reasonable excuse, and a reasonable excuse for what? It may be a ham-fisted attempt to say that if the agent's failure to do something (but what? File the return on behalf of the appellant?) is explicable, for example they became seriously ill just at the time they were supposed to do the something, that would give the appellant a reasonable excuse so long as they could not have filed the return themselves by taking reasonable steps. Seen in this light it seems to be an attempt to interpret paragraph 23(2)(b) Schedule 55.

164. That paragraph makes it clear that reliance on a third party is not a reasonable excuse only if the appellant themselves did not take reasonable care to avoid the failure to file. There is nothing in it to say that the third party's (not necessarily an agent's) actions have to amount to a failure to file the return themselves (though that will often be the case with eg accountants entrusted to file income tax or VAT returns). In my view all that is necessary is that the actions or omissions of a third party caused or substantially contributed to the failure, and that the appellant took what steps to prevent the failure that were reasonable to take. There may be many cases where there were no steps a taxpayer could take to prevent the failure, and many cases where it is not reasonable to expect any steps to be taken before the date for filing the return.

165. On this particular issue of third party reliance *Barrett* is also instructive. The caveat I must enter about this decision is that the reasonable excuse provision it was considering, s 118(2) TMA, contains no qualified exception to the definition of reasonable excuse such as is found in paragraph 23(2)(b) Schedule 55. I consider that point later.

166. In *Barrett*[9] Judge Berner said about the question of reasonable excuse and in particular third party reliance:

> "154. 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. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.
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> 155. Tribunals should, in particular, be cautious in making generalised statements concerning perceived categories of case, and equally circumspect about judging what is reasonable as a matter of the legal

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[9] Anyone seeking to search for this decision on Bailii, rather than the FTT website, will be thwarted, because Bailii have ever since its publication shown that case as "Barett" (one R).

test by reference to perceived policy. Although the relevant statutory provisions may be subject to a purposive construction, that is not the same as the setting of parameters for the application of a reasonable excuse provision by reference to the tribunal's own perception of underlying policy. In the case of s 118(2) TMA, with which this case is concerned, and which contains no reference to reliance on third parties, it is not in my view possible or permissible to discern any underlying purpose or policy with regard to such reliance from the statutory language.

156. Nor do I consider that there can be any principled distinction between cases which involve complex or "arcane" provisions of tax law, and those which may be regarded as more commonplace. That is nothing more than one of the circumstances to be taken into account in the application of the objective standard.

157. I turn then to the facts and circumstances of Mr Barrett's case. I am concerned in this respect not with the failure of Mr Barrett to deduct tax and make payments to HMRC, but with his failure to make returns, starting with the annual return for 2006-07 that was due, under regulation 40A of the Income Tax (Subcontractors in the Construction Industry) Regulations 1993, on 19 May 2007, and subsequent monthly returns under the 2005 Regulations.

158. Mr Barrett has, since around 2000, been a self-employed small jobbing builder. He had some experience of the CIS, or at least its predecessor scheme, from the perspective of a sub-contractor, when working as part of a team on more substantial construction projects. That, argued Miss McCarthy, gave Mr Barrett an awareness of the CIS which, when coupled with his experience as an employer after 2000 and the need to operate an analogous deduction system for PAYE, would have put a reasonable taxpayer in Mr Barrett's position on enquiry as to his obligations as a contractor under the CIS.

159. Mr Barrett did not make any particular enquiry in this regard, whether in informing his choice of accountant, which was done without any investigation into Mr Aspros' capabilities and experience, but for convenience of access, or in seeking particular advice from Mr Aspros as to his obligations under the CIS. Mr Barrett simply provided Mr Aspros with the relevant paperwork, and signed, without question, everything which Mr Aspros put in front of him. Miss McCarthy submitted that Mr Barrett's failure to make any check as to the position, whether from Mr Aspros or from HMRC, was unreasonable.

160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax

aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.

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.

162. I take into account the fact that Mr Barrett had some experience of a deduction scheme in the construction industry. However, that experience was as a sub-contractor in the context of larger projects, and would have given Mr Aspros no particular insight into the filing obligations of a contractor. Mr Barrett was himself unaware of those filing obligations when he first employed sub-contractors, but he had provided Mr Aspros with all the necessary paperwork from which Mr Aspros had been able to prepare Mr Barrett's accounts, including reference to expense incurred in relation to sub-contractors; accounts referring to such expenses, both for year end 31 January 2006 and 2007, had been completed well before the filing date for the annual return for 2006-07. In my view, a reasonable taxpayer in Mr Barrett's position, having employed an accountant to deal with both accounting and tax, including, PAYE, and having provided the accountant with all relevant information with respect to his business, would have been entitled to rely on that accountant to draw attention to any relevant filing obligation. It would also have been reasonable for such a taxpayer to have concluded, from his accountant's silence, that there were no such obligations outstanding.

163. The fact that the filing obligation cannot be described as particularly complex, or arcane, does not alter the position for a notional taxpayer in Mr Barrett's position. Mr Barrett was an ordinary small trader who, taking account of his previous experience of the CIS, cannot be imbued with any particular sophistication or knowledge of the CIS so as to put him on reasonable enquiry as to obligations he had incurred merely by employing a few sub-contractors in a small way and on individual occasions. In short, it was not unreasonable for a taxpayer in Mr Barrett's position not himself to have been aware of the particular filing obligations under the CIS. This is not a case in which a taxpayer, knowing of an obligation, merely delegates that task to a third party and does not take reasonable steps to ensure that it has been undertaken.

164. In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question, and by appointing an accountant in the way that he did Mr Barrett acted as a reasonable taxpayer, aware of his own

> limitations in tax and accounting matters, would have done. There was nothing unreasonable in the manner in which Mr Barrett conducted his relationship with Mr Aspros, or in the timely provision of relevant information from which Mr Aspros could reasonably have been expected to identify the relevant filing requirements for a business such as that of Mr Barrett. It was not unreasonable for such a taxpayer to have assumed that Mr Aspros was able to, and would, advise on any relevant tax obligation that was apparent from the information provided to him. Nor was it unreasonable for a taxpayer such as Mr Barrett, having received from Mr Aspros no indication that any filing obligation had been incurred in respect of his use of sub-contractors, not to have raised the question himself whether there might be a filing obligation of which he was unaware, either with Mr Aspros, or HMRC, or indeed anyone else.
>
> 165. Accordingly, I conclude that Mr Barrett had a reasonable excuse for the non-filing of the CIS returns for which the penalties under s 98A TMA have been determined."

167. I make no apologies for quoting so much of this decision. It is in my view as relevant to paragraph 23 Schedule 55 as it is to s 118(2) TMA so long as in the Schedule 55 case the appellant can show that they, not the third party, took reasonable care to avoid the failure.

168. The appellant says that he expected that the firm dealing with the sale of the dwelling of which he was joint owner in the UK would deal with the necessary obligations.

169. I find as fact that the appellant had that genuine and honest belief. I also consider that it was objectively reasonable for him to assume that a firm carrying out a residential property sale would inform him, knowing that he was living in Belgium and working for the EU, of any relevant tax obligation.

170. The fact that the firm failed to inform the appellant of his obligation because they did not know of it is neither here nor there. As *Barrett* makes clear, the accountant in that case did not do what he should have done but that did not make Mr Barrett negligent or deprive him of a reasonable excuse.

171. Because of paragraph 23(2)(b) Schedule 55 I must go on and consider whether despite my finding that the appellant reasonably relied on a third party, the appellant did not take reasonable care to avoid the failure. I am at a loss to see what the appellant could have done to avoid the failure. What should he have asked the conveyancing firm?

172. In my view his reliance on a third party, however misguided it turned out to be, was reasonable and he took all reasonable care to avoid the failure, namely none as there were none he could have taken. Thus he had another reasonable excuse for the failure.

173. Paragraph 23(2)(c) provides that if a reasonable excuse ceases, then it cannot be relied on to frank a continuing failure if the failure is not remedied within a reasonable

time after the excuse ceases. The appellant says he became aware of the obligation when preparing his 2015-16 tax return and immediately submitted both outstanding NRCGT returns. HMRC do not suggest, by reference to the dates they have for actions of the appellant that this is not so, and I find that the appellant did indeed remedy the failure within a reasonable time of its discovery.

174. I would therefore have held that the appellant had another reasonable excuse for his failure to file the return on time, and on that account would have cancelled the penalty had the appellant been an appropriate person.

Special circumstances

175. In relation to the question whether a special reduction of the penalties is to be made, the Tribunal has a different jurisdiction from the one it has in relation to whether there is a reasonable excuse for the failure. The jurisdiction in relation to the latter is a full review one. In relation to the special reduction the Tribunal can only intervene if the decision made by HMRC on the question is flawed in judicial review terms. The decision will be so flawed if the decision maker takes into account that which they should not taken into account, or if they fail to take into account something they should have so taken or made an unreasonable decision.

176. The review officer, Ms Storey, says that in reaching her decision that there are no special circumstances she had considered that the appellant was unaware of the new requirement for a NRCGT return and that there was no loss to HMRC because there was no tax due. These two matters are listed as numbers 1 and 2 in her letter. After item 2, there is a list of other points that the appellant made in his SA 634 in précis form, that the penalty is not reasonable; discriminatory; does not recognise prompt compliance when one becomes aware of the requirement and is disproportionate.

177. Ms Storey may have taken these into account but she gives no explanation why she thought they did not amount to special circumstances. Her decision in in my view flawed for that reason.

178. The SoC simply sets out with less detail what Ms Storey said.

179. In the HMRC reply of 7 March 2018 Ms Lucy Lawrence, the compiler of the SoC, said that HMRC have continued to consider special circumstances since the appeal was notified to the Tribunal, and reiterated that HMRC consider that there are none. But she added that their post-notification consideration has included the appellant's argument (raised first in his reply to the SoC) that his case is on all fours with that in *Welland.* In that case Judge Mosedale accepted that the imposition of three penalties in the same tax year for three separate disposals amounted to special circumstances, she having first held that HMRC's decision on the subject was flawed because they did not consider it all.

180. Ms Lawrence says that she does not think that the circumstances in this case are the same as in *Welland* and for that reason the appellant's disposal of two properties in the same year does not amount to special circumstances. This was because in *Welland*

there were three disposal in quick succession. Here there were two disposal in seven months which is not quick succession.

181. The appellant's response to this in his email of 15 March 2018 is to say that the length of time between the sales is immaterial. The point is that the deadline for notifying the second disposal had already passed before he became aware of his obligations and like the taxpayer in *Welland* he acted immediately to remedy both failures.

182. In *Welland* what Judge Mosedale said on this issue was:

> "*Three penalties in a row*
>
> 135. Although Mr Welland did not raise this as a ground of appeal, it is obvious that the penalties amount to £1,800 because he sold three properties in one tax year: had he sold two of the properties in a later tax year he would no doubt have learned from bitter experience that an NRCGT return had to made 30 days after completion. Mr Welland was unable to learn from his mistakes, as he was late filing all three returns before he learned of his filing obligation.
>
> 136. Does the fact Mr Welland sold three properties in one tax year amount to special circumstances?
>
> 137. Taking into account the principles explained in *Warren*, I find that the circumstances are unusual but not unique. Can it be said it is significantly unfair for Mr Welland to bear the whole penalty? A taxpayer selling a single valuable property who failed to make the return would be penalised once; Mr Welland, selling three not so valuable properties, was penalised three times. And it is clear he did learn from his mistakes: he filed as soon as he realised his mistake and avoided the 12 months penalty on the last of the three sales.
>
> 138. I think that does amount to special circumstances, particularly in circumstances (which is not in dispute) where the taxpayer has previously had a good compliance record. Parliament, while intending to penalise non compliance, must have intended taxpayers to learn from their non-compliance. Because of the three sales in quick succession, Mr Welland was unable to do so. I consider that the penalties should be reduced so that only the penalty on the first sale in tax year 15/16 should be payable. In other words, I reduce the penalty to £700."

183. In my view the appellant is correct. It is not the precise gap between the sales (and the gap between the first and last sales in *Welland* was six and a half months – see [10]) that persuaded Judge Mosedale that the circumstances were special: it was the fact that Mr Welland learned from his mistake, as Parliament intended him to by enacting Schedule 55 FA 2009, that he filed as soon as he realised there was a problem and that he had a good compliance record.

184. Thus in my view Ms Lawrence has taken into account something she should not have, the length of time between successive disposals, and failed to take into account the actual reason for Judge Mosedale's decision. In *Welland* Judge Mosedale reduced to nil the penalties on the second and third disposals. In this case the obvious thing for

me to do when remaking the decision, as I am entitled to do, is to cancel the penalty for the second disposal. But the appellant has not appealed it. I do not think that would have prevented me from effecting a reduction, and I would have, had it been necessary, reduced the initial penalty on the first disposal here to nil.

185. There are further matters which the appellant has raised and which were taken into account by Ms Storey and possibly again by Ms Lawrence in her continuing review of this issue but in relation to which they have not given any reasons for their rejection of them as special circumstances. It is therefore impossible for me to consider whether they have failed to take into account relevant matters or have taken into account irrelevant ones when coming to their decisions on each. They are in my view flawed decisions (see in this regard *A Taxpayer v HMRC* [2018] UKFTT 892 (TC) (Judge Guy Brannan)).

Discrimination

186. If the discrimination of which the appellant complains can be remedied by an application of law on which this Tribunal can adjudicate then there is no need to consider whether such discrimination amounts to special circumstances.

187. In a previous decision (*Alison and Richard Bradshaw v HMRC* [2018] UKFTT 368 (TC)) on a penalty for failure to make an NRCGT return, I considered the UK/Canada Double Taxation Convention in this respect. In that decision I said:

> "42. Article 22 is about non-discrimination. Paragraph (1) says:
>
> > "(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected."
>
> 43. I have no information to suggest whether the appellant is a national of Canada. And I observe that the requirement which is more burdensome has to be more burdensome than a requirement on UK nationals. The NRCGT return is a burden placed on non-residents which is more burdensome than that placed on UK residents, although the UK residents concerned will include many non-nationals.
>
> 44. The commentary on Article 24 of the OECD's Model Double Taxation Convention concerning non-discrimination states:
>
> > "1. This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, the Article should not be unduly extended to cover so-called 'indirect' discrimination. For example, whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality such as a different treatment of individuals based

> on whether or not they hold, or are entitled to, a passport issued by the State, *it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality for purposes of that paragraph.*" [My emphasis]
>
> 45. The commentary goes on (at paragraph 7) to point out that a non-resident and a resident of a given state are not "in the same circumstances" as each other.
>
> 46. I conclude that there is nothing in the DTA that can help the appellants."

188. The Convention between Belgium and the UK is in terms materially identical to those in the UK/Canada Convention so any remedy for the alleged discrimination must be found elsewhere.

189. The appellant has not identified any basis for providing a remedy for discrimination on the basis of residence for tax purposes. The European Charter on Fundamental Rights ("ECFR") at art 21 says:

> "*Non-discrimination*
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, **any discrimination on grounds of nationality shall be prohibited.**" [my emphasis]

190. Article 14 of the European Convention on Human Rights ("ECHR") similarly says:

> "*Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

191. And to found a claim based on the ECHR it would be necessary for the appellant to show a breach of another right. Since he complains about being discriminated against because he has to complete a return earlier than a resident would have to making the same disposal (or has to complete two returns) I cannot see how Art 1 Protocol 1 ECHR can be engaged. No tax payment is being demanded of him in a discriminatory way.

192. Because there was no discrimination against the appellant of the type prohibited by any of the conventions I have considered, it follows that I do not consider that there is anything that could amount to special circumstances as a result.

193. In a general sense it could be said that non-residents who are required to make one or more NRCGT returns as well as an ordinary tax return are being made subject to an other or more burdensome requirement than residents[10], and that it would be possible for that to be considered a special circumstance. But on that point I would say that it is not special. It was clearly the intention behind s 12ZB TMA to require these returns from those who were liable to make a return of the gain, as well as others, and so any discrimination is built in and intended to apply to all of those within the scope of s 12ZB. That is not unusual or special.

Proportionality

194. The appellant's argument on this is that the level of penalties was disproportionate given that no CGT was payable on the transaction. In *Welland,* Judge Mosedale considered the same point made by the appellant in that case. She said:

> "*The penalties in this particular case*
>
> 145. In this case, no tax is payable, yet Mr Welland has been penalised with flat rate penalties amounting to £700 (or £1,800 before the reduction in the last section). He says this is disproportionate.
>
> 146. I am unable to agree. It is not 'plainly unfair' that HMRC demand returns where no tax is due: HMRC must have the right to demand tax returns so that they can check whether any tax is due. And in order to make the demand for returns effective even though the returns may show that no tax is due, there has to be a penalty for failing to provide the return. Penalties for failure to submit a return where no tax is due of £100, followed by two subsequent £300 penalties if the return is outstanding for 6 and then 12 months is not, on any view, plainly unfair.
>
> 147. I dismiss Mr Welland's case that the penalties imposed on him lacked proportionality."

195. I respectfully agree with what Judge Mosedale says.

Other points made by the appellant

196. Out of deference to the appellant's clear and articulate arguments, as one would expect from a senior European Civil Servant (but ones which are mercifully free of European institutional jargon) I deal with some other points he has made which are not strictly necessary for my decision.

Discrepancy in dates in notices

197. In his letter of appeal to HMRC dated 21 December 2016, by way of preamble, the appellant points out a discrepancy between the notices of assessment on the one hand and the "notification of charge", together with 2 emails informing him of the penalties on the other. He says that the former say he has 30 days to appeal from the date of issue of the notice while the latter say that the 30 days run from the date he

[10] That situation is likely to change soon if clause 6(3) of and Schedule 2 to the draft provisions for Finance Bill published by HMRC on 6 July 2018 become law.

received the notice, and he asks which is correct. He adds that the inconsistency is poor administration and a basis for his appeal.

198. He says if the addressees of notices have 30 days from the date of issue it is unfair where HMRC use method of postal communication that takes 3 weeks to arrive.

5 199. The notice of assessment of the penalties clearly states that an appeal must be made within 30 days of the date of the notice. The "Notification of Charge and Notice to pay" (which I have taken to be the demand required under s 60 TMA) says that if you think the notice is wrong write within 30 days from the date of issue. The two emails he refers to are not in the bundle of papers.

10 200. What the law says is in s 31A TMA:

> "(1) Notice of an appeal under section 31 of this Act must be given—
>
> (a) in writing,
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board.
>
> 15 (4) In relation to an appeal under section 31(1)(d) of this Act—
>
> (a) the specified date is the date on which the notice of assessment was issued, and
>
> (b) the relevant officer of the Board is the officer by whom the notice of assessment was given."

20 201. Section 31A applies to a penalty assessment where the tax involved is capital gains tax by virtue of paragraph 18(3)(a) Schedule 55 FA 2009. So the law does indeed say that the date is the date on which the notice of assessment was issued, not the date of receipt. I do not read the "Notification of charge" as saying anything different. If the emails said anything different they were wrong. But I note that HMRC's Self 25 Assessment Manual at SAM 10020 says:

> "The requirements for the submission of an appeal are [that] the appeal
>
> • Should be in writing and signed
>
> Certain appeals will also be accepted by telephone or online, provided the usual customer verification rules are followed
>
> 30 And
>
> • Must be made within 30 days of the issue of the Notice of Liability
>
> • In the case of a partnership, must be made by the nominated partner, see subject 'Maintain Taxpayer Record: Nominated Partner' (SAM101290), or his/her successor, or agent
>
> 35 The officer dealing with the appeal should use discretion as to whether the request is an appeal and whether the 30 day appeal period has been met. Appeals made via the customers Personal or Business Tax Account should be treated as signed appeals.

In practice, to allow for the print and issue of Notices of Liability, 37 days should be allowed from the date the charge is recorded on the taxpayer record. For tax years 2009-10 and earlier, the time allowed is 35 days." [my emphasis]

5 202. I have difficulty in following SAM 10020. The "date the charge is recorded on the taxpayer record" presumably means in a penalty assessment case the date of the assessment. Why would the date of the notice be different? And from what information does the HMRC officer calculate the 37 days? Why would the date of issue of the notice of assessment be later than the date of the assessment? This is baffling but may explain 10 a difference between the emails and the statutory notices, but it is not material to the appeals as no point of lateness of an appeal has been taken by HMRC. It does not constitute a ground of appeal in this case.

203. In the same letter the appellant commented about the fact that he could not retain a copy of the return he had made, and the email acknowledging it gave no information 15 even in summary form about the content of the return even though it said "What happens once we have received you return and computation, depends on what you have told us." The emails did not even give the address of the property, and as he had filed two returns on the same day he did not know which email referred to which return. This he said was bad administration.

20 204. I do not understand the complaint about retention of data. At the foot of the page on HMRC's website containing the NRCGT return as it existed at the date he made the return[11] (and still exists) there are the words:

> "After you click the 'Next' button you will see a preview page summarising the information you have provided."

25 205. That next page will show the details as they are shown on the screenshot of the details that appear on HMRC's end of the reporting system which is in the papers I have. As to what the email acknowledging the delivery of the return says I imagine that there are security considerations in play. Obviously getting two such emails on the same day for two same day returns for different properties could be momentarily 30 confusing, but the emails do not given any important information, unlike the emails that people receive in relation to their income tax returns and penalties where they have signed up to digital communication using a secure mailbox.

206. What is to my mind somewhat surprising about the HMRC webpages about NRCGT and the return to be made and delivered to HMRC under s 12ZB TMA is the 35 absence of any address to which a paper return is to be sent, or indeed how a paper return is obtained. That such a paper return is permitted to be delivered follows from the fact that s 115 TMA permits the use of post as an alternative to hand delivery or other types of delivery, including by electronic means unless another method is mandatory. I have not found any Act or statutory instrument that makes an electronic

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[11]http://webarchive.nationalarchives.gov.uk/20161003130059/https://online.hmrc.gov.uk/shortforms/form/NRCGT_Return?dept-name=&sub-dept-name=&location=43&origin=http://www.hmrc.gov.uk

return mandatory in the case of the NRGCT return (and all such mandatory provisions as I have found allow for exceptions[12]).

207. Indeed I have not found anything in the Taxes Acts or secondary legislation that does permit an electronic return under s 12ZB. I started my quest by observing that at the foot of the webpage on which the NRGCT there is a link to "Terms & Conditions". This brings up the standard Terms & Conditions for all use of electronic communication with and by HMRC. Under the heading "Individuals" it sets out conditions for using online services. But in relation to those online services such as for filing a "Self Assessment Tax Return" it is said that that a person must register for online services through the Government Gateway and a User ID and password will be needed to access them. Use of these online services to deliver returns rather than post or personal delivery is permitted by various regulations made under sections 132 and 133 FA 1999 and for individuals and other liable to income tax and CGT the regulations are the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282).

208. The scope of the regulations is et out in regulation 2(1)(a) which allows electronic communication for delivery of information to or by HMRC where that delivery is required or authorised by or under:

> "any provision of section 8, 8A, 8B, 9, 9ZA, 9ZB, 9A, 9B, 9C, 9D, 12AA, 12AAA, 12AB, 12ABA, 12ABB, 12AC, 12AD, 12AE, 28A, 28B, 28C, 30B, 59C, 59DA, 59E or 100 of the Management Act,"

and Schedule 1A to that Act. Sections 8, 8A and 12AA are provisions requiring a return, but s 12ZB is not included.

209. It follows that regulation 5 of SI 2003/282 does not apply, as it says:

> "(1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the … Management Act if, but only if, all the conditions imposed by—
>
> (b) these Regulations,
>
> (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
>
> (c) any specific or general direction given by the Board,
>
> are satisfied."

210. I take this non-application of SI 2003/282 and particularly regulation 5 to mean that the electronic communication of an NRCGT return may not be authorised. Whether that has the effect that a penalty cannot be imposed for failure to deliver it is

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[12] See eg regulation 3(2A) to (2C) and (1) to (11) SI 2003/282 (corporation tax), regulation 67B(5) and 67D SI 2003/2682) (PAYE) and regulation 25A(3) and (6) SI 1995/2518 (VAT).

a question that must await another case, where the arguments can be deployed, assuming that the point is arguable.

211. The appellant says that is illogical to let him off the paragraph 4 penalties but not the paragraph 5 and 6 penalties. It might be if the reason for letting him off the paragraph 4 penalties was because there had in fact been substantial compliance. But the reason is more likely to be, a I have suggested above, that HMRC realised that they could not legally charge the penalties – it is their incompetence rather than an illogical application of a policy that is in play here.

Decision

212. Under paragraph 22(1) Schedule 55 FA 2009 I cancel the penalties of £1,600.

213. 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: 1 October 2018

APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

…

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	*Return or other document*
…	…	…
2A	Capital gains tax	NRCGT return under section 12ZB of TMA 1970
…	…	…

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

SPECIAL REDUCTION

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) “appeal period” means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC’s decision, or

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

(3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—

(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 for judicial review.

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

23—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(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.