



**TC06777**

**Appeal number: TC/2017/05647**

***CAPITAL GAINS TAX – penalties - late filing of non-resident capital gains tax returns – whether reasonable excuse***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAVID MARSHALL**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 6 July 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 11 July 2017 (with enclosures) and HMRC's Statement of Case (with enclosures)] acknowledged by the Tribunal on 21 December 2017 and the Appellant's Reply dated 5 January 2018.**

## DECISION

1. The appellant, Mr Marshall, appeals against penalties for the late submission of a non-resident capital gains tax return (“NRCGT return”) charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2016.
2. The penalties are as follows:
- (1) A late filing penalty of £100, imposed under paragraph 3, Schedule 55
  - (2) A six-month late filing penalty of £300, imposed under paragraph 5, Schedule 55.

### Facts

3. The facts are straightforward and do not appear to be in dispute:
- (1) The appellant was resident in the United Arab Emirates during the relevant period and sold a property in London on 7 January 2016.
  - (2) In accordance with section 12 ZB TMA 1970, the NRCGT return was required to have been filed no later than 6 February 2016.
  - (3) The NRCGT return was filed on 12 November 2016 and so was submitted more than nine months late.
  - (4) Consequently, the penalty determinations set out above were issued to Mr Marshall.

### Relevant law

4. The requirement to make NRCGT returns was introduced into the Taxes Management Act 1970 (‘TMA’) by the Finance Act 2015.
5. With effect from 26 March 2015, a NRCGT return under Section 12ZB TMA was added to Schedule 55 by Finance Act 2015, section 37 and Schedule 7, paragraph 59. Paragraph 1(1) of Schedule 55 makes a person liable to a penalty if they fail to deliver a return of a type specified by the due date.
6. A failure to file the return on time engages the penalty regime in Schedule 55 (and references below to paragraphs are to paragraphs in that Schedule).
7. Penalties are calculated on the following basis:-
- (1) Failure to file on time (ie the late filing penalty) - £100 (paragraph 3);
  - (2) Failure to file for 6 months (ie the 6 month penalty) – 5% of the payment due, or £300 (whichever is the greater) (paragraph 5); and
  - (3) Failure to file for 12 months (ie the 12 month penalty) – 5% of payment due or £300 (whichever is the greater) (paragraph 6).

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

9. A taxpayer can appeal against any decision of HMRC that a penalty is payable and against any such decision as to the amount of the penalty (paragraph 20). On an appeal, this Tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

10. The legislation provides that a taxpayer may be relieved from penalties if he or she can show that there was a "reasonable excuse" for the default (paragraph 23). An insufficiency of funds, or reliance on another person, are prohibited by the same paragraph from being a reasonable excuse. In addition, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse only if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

11. If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16). On an appeal to the Tribunal, the Tribunal can either confirm the same percentage reduction as HMRC have given for special circumstances or it can change that reduction if the Tribunal thinks that HMRC's original percentage reduction was flawed in the judicial review sense (paragraphs 22(3) and (4)).

## 20 **Appellant's case**

12. The appellant's case can be summarised as follows:

(1) The new NRCGT rules caused confusion in the first year in which they applied for non-residents who were already registered for self-assessment and therefore already known to HMRC;

(2) There was insufficient publicity given to the unprecedented short filing period of 30 days from the property sale, as evidenced by the high number of solicitors who did not include such requirements within their completion process for the sale of UK residential property by their non-resident clients;

(3) The appellant complied with his self-assessment obligations for 2015/16 as he had done since being registered for self-assessment in 2006 and his self-assessment return included the relevant NRCGT computation;

(4) The 2015/16 NRCGT return did not require any information from the taxpayer because the relevant filing requirements were governed by the self-assessment rules for that year, as stated in the NRCGT return for 2015/16;

(5) There has been no adverse fiscal impact on HMRC of the failure to file the return on time;

(6) The level of the NRCGT penalty is excessive and provides unjust enrichment to the Exchequer;

(7) The penalties for NRCGT are unfair to non-resident taxpayers because, unlike the case with late filing penalties for self-assessment, the initial late filing

penalty of £100 with a warning of future penalties for continuing non-compliance is not sent to the taxpayer before such future penalties arise;

5 (8) It is inequitable and discriminatory to distinguish between non-residents registered for UK self-assessment and UK residents who are registered for self-assessment in setting reporting obligations for capital gains tax, as residents are only required to notify HMRC of chargeability with their self-assessment tax return.

### HMRC's case

13. HMRC's case is, in summary, that:

10 (1) The return should have been filed by 6 February 2016. They submitted that there was extensive information publicly available both before and after the change in legislation and the appellant had an obligation to stay up to date with legislation affecting their activities in the United Kingdom. HMRC does not believe that a lack of awareness of the law is a reasonable excuse. HMRC would expect a prudent person, exercising reasonable foresight and due diligence, with  
15 a proper regard to their responsibilities under tax law, to have researched what was expected regarding their tax obligations;

20 (2) The fact that an individual is registered for self-assessment does not mean that HMRC are aware of their ownership of UK residential property. The requirement to complete an NRCGT CGT return is in addition to any self-assessment obligations; the different returns operate under different regimes and legislation and so one cannot replace the other;

25 (3) The penalties are an administrative means of securing the production of timely returns, to encourage compliance. They are intended as a measure of fairness to ensure that customers who file late obtain no advantage over those who file on time.

14. HMRC had considered whether there were any special circumstances in this case and concluded that there were none which were uncommon or exceptional that would allow the penalty to be reduced.

### 30 Discussion

#### *Fairness of the regime*

15. Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok* (§36), the First Tier Tribunal "... has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair". Although *Hok* was concerned  
35 with VAT rather than NRCGT, it is clear that the principle applies to all penalties and so I consider that I have no jurisdiction to consider the appellant's contentions that the penalties are unfair and discriminatory.

*Reasonable excuse*

16. There is no statutory definition of “reasonable excuse” but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

5                   “a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

10 17. The issue here is whether the appellant’s lack of awareness of the need to file the NRCGT return could, of itself, constitute a reasonable excuse. In other words, can ignorance of the law in the sense of ignorance of an obligation imposed by the law, constitute a reasonable excuse?

15 18. There has been a divergence of view in cases before this Tribunal. In two cases, *McGreevy* [2017] UKFTT 690 (TC) and *Saunders* [2017] UKFTT 765 (TC) the Tribunal held that that lack of awareness did amount to a reasonable excuse.

19. Judge Mosedale, in both *Welland* [2017] UKFTT 870 (TC) and *Hesketh* [2017] UKFTT 871 (TC) and Judge Brannan in *Hart* [2018] UKFTT 207 (TC) disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

20 20. These are all decisions of the First-tier Tribunal and therefore none of them are binding upon me. The Upper Tribunal, whose decisions are binding upon me, considered in *Perrin* [2018] UKUT 156 (TC) that “it will be a matter of judgement for the [First Tier Tribunal] 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”.

25 21. The appellant’s grounds of appeal are set out in somewhat general terms: that the rules were somewhat confusing for non-UK residents who were already registered for self-assessment; that HMRC did not sufficiently publicise the very short filing deadline of 30 days and many solicitors had not grasped the need to include relevant reporting requirements. In correspondence with HMRC, the appellant’s agent notes that the filing  
30 of the NRCGT form “was temporarily overlooked”. There is no indication that the appellant took any steps to find out what his UK filing obligations were and how it therefore came to be overlooked or by whom.

35 22. I consider that a taxpayer in the position of the appellant with a responsible attitude to their duties as a taxpayer would have made enquiries as to the UK tax requirements on sale of the property and made sure that these were followed. The appellant does not indicate that any steps taken to establish the relevant UK tax position and so I must conclude that the appellant did not take any such steps and therefore, I find, does not have a reasonable excuse for the failure to file the return on time.

*Lack of impact on HMRC*

23. I have taken the appellant's submissions as to the fact that the 2015/16 NRCGT return did not require any information from the taxpayer and that there has been no adverse fiscal impact on HMRC of the failure to file the return on time as submissions to the effect that special circumstances should apply which would allow HMRC to reduce the penalties.

24. Case law has determined that, to be a special circumstance, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves, and must be "something out of the ordinary, something uncommon [or] exceptional, abnormal or unusual" and normally something external to the person doing the action in question, in contrast to something within his control.

25. HMRC concluded that there were no uncommon or exceptional circumstances that would amount to special circumstances that would allow the penalty to be reduced. I consider that the points raised by the appellant as to the lack of impact on HMRC do not meet the conditions to be special circumstances and so do not consider that HMRC's conclusion was flawed.

*Proportionality*

26. The appellant has argued that the penalties charged are excessive and represent unjust enrichment to the Exchequer. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, I have considered the question of "special circumstances".

27. Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

*Special circumstances*

28. Finally I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards I see no reason to overturn HMRC's decision.

**Conclusion**

29. The appeal is dismissed and the penalty confirmed in full.

30. 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.

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**ANNE FAIRPO  
TRIBUNAL JUDGE**

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**RELEASE DATE: 22 October 2018**