[2017] UKFTT 690 (TC)

TC06109

Appeal number: TC/2017/04089

CAPITAL GAINS TAX – non-resident CGT return – penalties of £1,600 for failure to file return within 30 days of completion of house sale – whether disposal in 2015-16: not proved, so penalties not due – alternatively, whether assessment met requirements of paragraph 18 Schedule 55 FA 2009: no, but s 118 TMA applies – whether paragraph 4 Schedule 55 penalties properly imposed: no,* Donaldson *applies and no paragraph 4(1)(b) HMRC decision – whether reasonable excuse: yes – whether special circumstances decision by HMRC flawed: yes – decision that there were special circumstances substituted – penalties cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

RACHEL McGREEVY — **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 8 September 2017 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 17 May 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 21 July 2017.

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DECISION

1. The penalties under appeal are for the tax year 2015-16 (though the HMRC Statement of Case ("SoC") describes that tax year as the "period ending 2015-16") and are said to consist of:

(1) £100 for failure to file by the due date

(2) £300 for failure to file by 6 months after the due date

(3) £300 for failure to file by 12 months after the due date

2. Astute readers will note that no daily penalties are included. The reason for this will become apparent.

The facts

3. I take the facts from the SoC filed by HMRC and from the documents attached to that Statement.

4. On 7 August 2016 the appellant submitted an NRCGT return in electronic form[1]. The printout of the return entries shows:

(1) the appellant's address as 203/47-51 Lilyfield Rd, Rozelle, NSW, Australia 2039,

(2) the gain related to the disposal of a property at 91 Lullingstone Crescent, Orpington, Kent, BR5 3DY,

(3) the date of conveyance was 7 July 2015,

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

(5) any gain was exempt because of private residence relief ("PRR"), and the property was said to have been the private residence of the appellant up to 1 February 2011, and

(6) the amount of CGT due was nil.

5. On 6 September 2016 HMRC (NRCGT) wrote to the appellant. The letter was headed "Non-resident Capital Gains Tax (NRCGT)" in large bold type. The next two lines also in bold type were "Late filing penalties" and "These Penalties total £1600", the second being in larger type than the first.

6. After salutations and the address of the property, the letter continued:

> "I have received a NRCGT return from you relating to the disposal of the above property on 7/7/15.
>
> This property was subject to NRCGT and, you were required to file an NRCGT return within 30 days of the sale being finalised which was 6/8/15.
>
> We did not receive this return until 7/8/16

[1] There appears to be no facility for printing the return or obtaining a paper copy and sending it by post or delivering it directly. I discuss the lawfulness of this later.

> This is a notice of assessment for a late filing penalty under Schedule 55 of the Finance Act 2009."

7. The second page contained the actual notice of the assessment which charged £1,600, broken down as set out at §1, but also including a daily penalty of £900.

8. Appeal rights were then described, that an appeal must be made in writing within 30 days. The letter contained no name of an officer.

9. On 21 October 2016 the appellant wrote to HMRC's Leics. and Northants Area office appealing against the penalty assessment.

10. She said:

> "With reference to the late filing, I understood that the CGT would be payable as part of the Self-Assessment, which I submit annually as a non-resident. We are required to complete this and send it to the HMRC by October following the end of the financial year, which I duly did in good faith.
>
> It was not until I initiated the Self-Assessment and read the section associated with CGT that I became aware of the requirement to submit the CGT return within 30 days of the competed sale. I had absolutely no idea this was necessary and I had received no previous advice to do this.
>
> On finding out that a separate CGT assessment process was necessary, I completed the submission without delay and at no time sought to evade or avoid this, so I believe any penalty is grossly unfair. For this reason I am appealing the penalty.
>
> In addition to this, the notice was issued on 8th September 2016 and has taken approximately six weeks to reach me – well beyond the due date!"

11. On 3 February 2017 the NRCGT Team replied. The heading of their letter said the appeal was against the penalties for sending in a return late for 2015-16. [It actually said "for the 2015 to 2016 tax year" which does not make a great deal of sense to me]

12. The body of the letter started:

> "You told us that you didn't send your tax return in on time because you had no idea that a [NRCGT] tax return was required."

13. The Team rejected the appeal on the grounds that the appellant had no reasonable excuse. It was, they said, her responsibility to ensure that an NRCGT return was submitted on time as all the relevant information had been clearly publicised on the "Gov.uk" website. "It [*sic*] states the process, timelines and what penalties will be charged if the return is submitted late."

14. The letter goes on to give HMRC's view that a reasonable excuse will only exist when an unexpected or unusual event, either "unforeseeable or beyond your control"

has prevented you from sending your return in on time. "We consider the facts in each case" says the letter, but no more was said about the facts presented by the appellant.

15. On 14 February 2017 the appellant replied saying:

> "I'm afraid you have misunderstood the basis of my appeal; in the letter you state:
>
> > 'You told us that you didn't send your tax return in on time because you had no idea that a NRCGT tax return was required.'
>
> This is not the issue. I did know that a CGT return was required, but I did not know that it was required within 30 days of completion and had thought this would be covered in the annual self-assessment that I submit every year, in which there is a section for CGT!"

16. At the end she asked HMRC to reconsider the decision.

17. HMRC seem to have taken this as a request for a review, as they wrote a letter to the appellant on 25 April 2017 to give their conclusions of their review.

18. That letter started by saying that following representations by a number of customers HMRC had changed their position on daily penalties and would no longer issue them, and past daily penalties were being withdrawn. Thus, said Mary Corbett, the reviewing officer, she was cancelling the proportion of the penalty that arose from daily penalties.

19. She went on to uphold the decision to charge the remaining £700 penalties. She made two points in response to the appellant's letter. First:

> "The new legislation was announced in the Chancellor's Autumn Statement in December 2013. Information about self-assessment, the completion of returns, tax payment dates, penalties and so on is well within the public domain and widely available via the internet including HMRC's website. In view of this it would have been expected that you would be aware of the resources mentioned in relation to keeping up to date HMRC and your obligations.
>
> It is your responsibility to ensure all your tax obligations are met. If you live abroad you would be expected to have taken steps to fulfil this [*sic* – this what?]."

And second:

> "The NRCGT return is separate to [*sic*] your individual Self assessment tax return. You would not have been prompted individually by HMRC. It is not known by HMRC who needs a tax return and what supplementary pages are needed so there is a requirement to notify chargeability."

20. As to a special reduction Ms Corbett said that she took into account the appellant's letter. But no more.

21. On 19 May 2017 the appellant notified her appeal to the Tribunal.

22. I also mention here the information or documents that I would have expected to see provided by HMRC with their SoC, but did not. These are:

(1) the income tax returns made by the appellant, or details of them, especially that for 2015-16,

(2) the nature of the income on which the appellant is chargeable, which I guess is income from rents from the house in Orpington, as little else is likely to be taxable in the United Kingdom on an Australian resident[2], and the letting of the house after emigration would establish or contribute to a establishing a right to PRR under sections 222 to 222C and 223A Taxation of Chargeable Gains Act 1992 ("TCGA") after the emigration,

(3) full details of the information said by HMRC to have been readily available to the appellant on what they call either "gov.uk" or the HMRC website: the only document of that sort in the bundle is "Capital Gains Tax for non-residents: UK residential property" published 6 April 2015 and updated 10 August 2016 (but there is no information about the updates to show what the document may have said when originally published, the time when HMRC say the appellant should have been aware of it),

(4) evidence showing that the penalty assessment was actually made and by whom. I have a document (see §7) demonstrating that a notice of assessment was given to the appellant by an anonymous member of a team. This is the opposite of the usual HMRC practice in standard Schedule 55 penalty cases for late filing of s 8(1) TMA returns, where HMRC give the computer printout as evidence of the making of the assessments, but cannot provide a copy of the notice, and

(5) the "SA Notes" for the appellant, which would show what tax forms and documents were issued to the appellant and when.

Law

23. I set out first the law as to filing returns that applies to non-resident with UK sources of taxable income.

[2] Under Art. 6(1) of the UK/Australia Double Taxation Convention which entered into force on 17 December 2003 "[i]ncome derived by a resident of a Contracting State from real property may be taxed in the Contracting State in which the real property is situated." Art. 13 provides that "[i]ncome or gains derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State." thus giving the UK the right to tax gains from the disposal of the appellant's property in the UK.

24. This is in s 8 Taxes Management Act 1970 ("TMA"), as it is for residents, which provides as follows:

> **"8 Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source …
>
> …
>
> (1D) A return under this section for a year of assessment (Year 1) must be delivered—
>
> (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
>
> (b) in the case of an electronic return, on or before 31st January in Year 2.
>
> …
>
> (3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.
>
> (4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person."

25. There are special pages for non-residents that fall within the scope of s 8(4). Section 8(1) has therefore always been apt to require a non-resident to return information for the purposes of capital gains tax[3].

[3] Since the original enactment of capital gains tax ("CGT") in 1965 a non-resident individual has been liable to CGT on gains on assets forming part of or used for a branch or agency in the UK of a trade.

26. As to NRCGT returns, TMA provides a rather more complex picture:

"**NRCGT returns**

12ZA Interpretation of sections 12ZB to 12ZN

(1) In sections 12ZA to 12ZN—

5 "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
10 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
15 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
20 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
25 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
30 "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
35 disposal.

(2) In subsection (1) the "appropriate person" means—

(a) the taxable person in relation to the disposal, …

(TCGA has not been updated to refer to a permanent establishment, and still refers to s 82 Taxes Management Act repealed in 1995). A non-resident has also been taxable to CGT since 1973 on the disposal of exploration or exploitation rights and assets and unlisted shares deriving their value from such rights (but not from such assets) – s 276 TCGA.

…

(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,

(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 1992 Act;

“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.

…

(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

(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 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 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),

(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 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).

5 (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
10 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
15 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
20 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

25 (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") … —

30 (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
35 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),
40 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."

27. The provisions set out above have effect in relation to disposals made on or after 6 April 2015 – paragraph 43 Schedule 7 FA 2015. Section 12ZBA TMA came into force on 15 September 2016 (it was inserted by s 91 FA 2016 with effect from Royal Assent, as no specific start date was contained in that section) but has retrospective effect back to 6 April 2015 – see s 12ZBA(2).

28. The provisions of Schedule 55 that are relevant to this case are lengthy and unlike those for NRCGT returns familiar to many likely readers of this decision so as they are also referred to later in the discussion section I have put them in an Appendix.

HMRC Guidance and other publications

29. HMRC's main reason for holding that the appellant had no reasonable excuse for her failure is that there was ample publicity for the fact that a non-resident who disposes of a dwelling situated in the UK must make a NRCGT return within 30 days of the completion date.

30. As HMRC have not provided any details of this publicity and guidance material, other than the online document mentioned in §22(3) which dates from August 2016, I have had to research the position myself.

31. HMRC refer first to the Chancellor's Autumn Statement in 2013. It is mentioned in the SoC (though for the wrong year) and the reviewing officer's letter as an obviously important matter (its importance and relevance is something I discuss later). The Statement itself (the Green Book) says at paragraph 1.295:

"Autumn Statement 2013 announces further measures to ensure that those with the means to do so continue to pay their fair share of tax. The government will:

- introduce capital gains tax on future gains made by non-residents disposing of UK residential property from April 2015 – a consultation on how best to introduce the new capital gains tax charge will be published in early 2014."

32. The Consultation Document ("Condoc") referred to there was published in March 2014. On the obligations to account for the tax the Condoc said:

"3.15 The government is minded to introduce a new process for the reporting and payment of CGT by non-residents who dispose of UK residential property. The government's preference is to introduce a form of withholding tax that operates alongside an option to self-report the tax due. Many other countries that

> operate separate tax regimes for income and capital gains tax, including Spain, Australia and Canada, also operate withholding taxes to ensure tax collection from non-residents."

33. No doubt the idea of a withholding tax was prompted not only by overseas examples mentioned such as Australia[4] and probably also the US FIRPTA[5] rules, but also through tapping the corporate memory of previous withholding taxes imposed by the UK on land transactions such as s 40 Development Land Tax Act 1976 ("DLTA") and paragraph 7(3) Schedule 16 FA 1969, which became s 777(9) Income and Corporation Taxes Act 1988 and then briefly s 944 Income Tax Act 2007.

34. But by June 2014 withholding was receding from favour in the light of responses to the consultation of March. Minutes of the consultation working groups in May and June 2014 published by HMRC show this:

> "There was one working group on withholding tax at which HMRC explained that officials were now considering a 'payment on account' system for taxpayers who were not already within the self-assessment system, rather than a system whereby tax is withheld by a person other than the disponer. The meeting focused on how best to design a system that is effective, proportionate and does not cause unnecessary administrative burdens.
>
> Participants in this working group discussed the following points:
>
> 1. Options as to how the collection process would work in practice
>
> 2. Options on how to compute the tax due
>
> Key themes and points of consensus among attendees were:
>
> Most participants felt that a 'payment on account' process was sensible, as it would mean that normal conveyancing process would not be disturbed and the solicitors would not be obliged to withhold monies on HMRC's behalf.
>
> There was a call for detailed guidance from HMRC once the tax comes into force, so that those involved in property transactions could advise clients appropriately. Some advisers noted that they may offer a service to fill in the relevant forms for their clients, but felt that agents should not be compelled to do so.
>
> There was some discussion about the proposal for a 30 day window to make an initial estimate of gains and payment on account. Some concerns raised about complex situations and

[4] Sub-division 14-D of the Taxation Administration Act 1953 (no. 1 of 1953)

[5] Section 1445 of the Internal Revenue Code 1986 (Federal Code Title 26) which imposes a 15% withholding tax in the case of any disposition of a United States real property interest, subject to exceptions.

time allowed for amendments where non-residents were not within self-assessment."

35. The "Responses" document published in November 2014 "Implementing a capital gains tax charge on non-residents: summary of responses" contains information about a different procedure as follows:

> "**Reporting and payment**
>
> 7.12 The consultation document set out that charging CGT on non-residents will bring in a new population to the UK tax system, about whom HMRC currently holds limited or no information. As such [*sic*], in order to ensure that the CGT charge is introduced in a way that is effective and sustainable, the government believed that it will have to introduce a new reporting and payment mechanism.
>
> 7.13 As such [*sic*], the government considered that a form of withholding tax would apply alongside an option for the taxpayer to self-report the tax due. There would then be some transfer of monies and reporting of the tax paid, to allow for any differences to be settled with HMRC. The consultation document suggested that it may be possible to do this in a similar way to the existing SDLT process, with agents transferring monies due within 30 days.
>
> Question 13: Do you believe that solicitors, accountants or others should be responsible for the identification of the seller as non-resident, and the collection of the withholding tax? If not, please set out alternative mechanisms for collection.
>
> Question 14: Are there ways that the withholding tax can be introduced so that it fits easily with other property transactions processes?
>
> Question 15: Do you think that the government should offer the option of paying a withholding tax alongside an option to calculate the actual tax due on any gain made from disposal, within the same time scales as SDLT?
>
> Question 16: Is it reasonable to ask non-residents to use self-assessment or a variant form to submit final computations within 30 days? If not, what processes would be preferable?
>
> **Stakeholder responses**
>
> 7.14 Most respondents recognised the need to introduce an appropriate mechanism to ensure that the tax is collected, given the potential compliance issues that would arise otherwise. However, many respondents had concerns about the proposed design of this mechanism in the consultation document, and voiced these concerns prior to the working groups. As such [*sic*], thinking developed in the period between the publication of the consultation document and the working groups with the result

that in the working groups a 'payment on account system' (POA), rather than a 'true' withholding tax, was discussed.

7.15 Overall, respondents did not think that solicitors, accountants or other UK advisers involved in the process of buying and selling property should be responsible for either the identification of the seller as non-resident or collecting tax. A number highlighted a range of practical issues, such as that in some cases it is only possible to accurately determine whether or not an individual is UK resident at the end of a tax year. A number also noted that UK advisers can ask clients whether or not they are resident, but beyond this it is not clear what powers they have to determine the truthfulness of the clients' response. As such [*sic*] a number of respondents argued that should such an obligation be imposed HMRC should be obliged to verify the individual's response.

7.16 A number of respondents proposed extending the non-resident landlord scheme as an alternative to a withholding tax. A number also proposed that payment of the tax due within the self-assessment (SA) system would be a sensible option for those that are already within the SA system. Most of those respondents who had attended the working groups during the consultation process noted that they strongly preferred the POA system discussed in the working groups during the consultation process as an alternative to a 'true' withholding tax.

7.17 Most respondents felt that a withholding tax is rather distinct from other forms of property taxation in the UK, and that careful consideration would need to be given to ensure that it will fit easily with other property transaction processes.

7.18 Most respondents felt it would be crucial that any withholding tax is calculated on the basis of the actual tax liability. Many noted that as the charge will apply only to gains arising from April 2015 onwards, the actual tax due will likely be relatively low in initial years, and as such as withholding tax based on a flat percentage of the sale is likely to be punitively high. Many respondents also felt that having 30 days in which to submit a calculation would be unworkable, and a number thought the self-assessment time frame would be more reasonable. A number also felt that the time limit in which to calculate tax due should run from the date of completion, rather than from the exchange of contracts.

Government response

7.19 The government's view is that a new reporting and collection mechanism is necessary but needs to be proportionate in ensuring that the regime is both robust and sustainable. The government understands that introducing a new withholding tax is a significant change, and wants to minimise burdens where possible.

7.20 As such, [*sic*] the new mechanism will take the form of a 'payment on account' process, rather than a 'true' withholding tax.

Outline of the process

7.21 Although the design of the process is yet to be finalised HMRC are working on the following outline.

7.22 A different process will apply to non-residents with an established relationship with HMRC via a live self-assessment record to those that do not. *However, in both cases the non-resident disposing of UK residential property will need to notify HMRC within 30 days of the property being conveyed that the disposal has occurred.* There will be no obligation on those involved in the transaction to collect the tax due, but the government expects that it is likely that they will facilitate the process and could charge a fee for their service. [*my emphasis*]

7.23 HMRC will need to be notified where there is a loss, or no gains on the disposal of the property, or if any gains made are covered by an individual's annual exempt amount. The notification will also be the method by which a private residence relief (PRR) nomination is made.

7.24 Where there is an existing relationship *and the disposal is not exempt by virtue of PRR*, the person will also have to deliver their self-assessment return after the end of the tax year and make any payment that is due within the usual self-assessment timescales in the normal way. A person may choose to make a payment on account in respect of the disposal and, if so made, this will be shown as a credit on their self-assessment statement. [My emphasis]

7.25 For these purposes, a live self-assessment record will not include the declaration of the disposal or delivery of an ATED-related CGT return.

7.26 A person who does not have an established relationship with HMRC, as detailed above, will be required to deliver a return for the disposal within 30 days and make payment at the same time. The return will be treated as if it were the self-assessment return for the tax year in question, with amendments being permitted within 12 months following the normal self-assessment filing date for the tax year in which the disposal is made.

7.27 Further information and guidance will be published in due course will be provided in due course [*sic*]"

36. Draft clauses about NRCGT were published in December 2014, but did not include the TMA provisions.

37. On 18 March 2015 HMRC published a document "Capital Gains Tax for non-UK residents: sales and disposals of UK residential property" which was part of the

website area for Budget 2015 documentation and for “Tax agent and adviser guidance”. It was subtitled “Frequently Asked Questions”, though who had asked the questions, how frequently they had been asked and in response to what was not said. Possibly they were questions arising out of the Responses document. The relevant frequently asked questions are:

> “**Q13 How, and by when, do I pay the new CGT charge?**
>
> A13 *You will need to report the disposal on a NRCGT return and pay any CGT due within 30 days of the day after the date the property sale is completed (i.e. the date when title is conveyed). If you are already within the UK’s self-assessment (SA) system for income tax and CGT, you will need to report the disposal on a NRCGT return within 30 days with payment being made as part of your normal end of year tax payment or you will also have the option to pay at the time of reporting.* Reporting and payment will be made electronically. More information will be available via GOV.UK after 5 April 2015 (including a link to the return form). Amendments can be made within a year of 31 January following the end of the tax year when the disposal was made (see Q2). [*my emphasis*]
>
> **Q14 I already file UK Self-Assessment tax returns, do I need to report the disposal in my end of year tax return?**
>
> A14 *Yes. The disposal must be reported on both the NRCGT return within 30 days of the conveyance and again on the relevant SA tax return.* The relevant SA tax return is that for the year when the disposal took place (see 2.). For example, if contracts were exchanged on 31 March 2017 and the property conveyed on 1 May 2017, the relevant return is that for the tax year 6 April 2016 to 5 April 2017. [*my emphasis*]
>
> **Q15 I have disposed of a property but calculated I have no CGT to pay. Do I still need to report the disposal?**
>
> A15 Yes. *All disposals must be reported to HMRC irrespective of whether there is a tax liability. The same reporting process will apply regardless of whether there is a chargeable gain, a gain covered by the annual exempt amount, a gain covered by relief such as PRR or a loss.* If there is more than one disposal each disposal is to be reported within 30 days of conveyance of the property. Further details will be provided shortly regarding the reporting process. [*my emphasis*]
>
> **Q21 Why are these changes being made?**
>
> A21 The changes have been introduced to improve the fairness of the tax system by addressing the current imbalance between the treatment of UK residents and non-residents disposing of UK residential property.
>
> **Q23 Where can I find further information?**

A23 The government's summary of responses document outlining the decisions taken and how the CGT charge will operate can be found here https://www.gov.uk/government/consultations/implementing-a-capital-gains-tax-charge-on-non-residents - Implementing a capital gains tax charge on non-residents."

38. The next thing obviously published by HMRC was the webpage "Capital gains tax for non-residents: UK residential property" which shows an original issue date of 6 April 2015. That is not the version in the bundle, but with the help of an internet memory site I have found what it said on that date.

39. It starts:

> "**Overview**
>
> You need to tell HM Revenue and Customs (HMRC) if you've sold or disposed of a UK residential property after 5 April 2015 if you're a:
>
> - non-resident individual
>
> **Deadline for reporting the disposal and payment**
>
> You must tell HMRC within 30 days of conveyance, for example no later than 31 July if you convey on 1 July.
>
> You must report the disposal online using the non-resident Capital Gains Tax return [*this underlined passage contained a hyperlink to the return*] within this deadline, even if:
>
> - you've no tax to pay
> - …
> - you're registered for Self Assessment
> - …
>
> …
>
> You might also have to pay any non-resident Capital Gains Tax due within the same 30 day period - although there are exceptions to the pay now rule if you already have an existing relationship with HMRC, for example through Self Assessment. If you do, you can either:
>
> - pay when you submit your return
> - defer payment until your normal due payment date"

40. It continues by referring to the penalties for non-filing:

> "**Penalties**
>
> You'll have to pay a penalty [*link to self-assessment tax returns penalties website*] if you:
>
> - report the disposal late

- send in your tax return late
- miss the payment deadline

> You may also have to pay a penalty if the information you report to HMRC through the online form or your tax return is inaccurate or you do not keep records.
>
> Information about penalties HM Revenue and Customs may charge if you have sent an inaccurate return or other document - factsheet CC/FS7a [*link to website page about Schedule 24 FA 2007 incorrect return penalties*]"

41. The 2016 version given to me in the bundle has slightly different text about penalties. It says:

> "**Penalties**
>
> You have 30 days from the date of conveyance to report your disposal and pay any tax due. You'll get a penalty if you miss the reporting deadline and be charged interest if you do not make full payment within time.
>
> The amount of penalty is the same as for a late self-assessment [*link to website for late return penalties*] tax return."

42. On the date that the webpage just covered was published, 6 April 2015, it is likely (though I cannot be sure in the absence of records in the bundle) that a notice to file an income tax return for 2014-15 was issued to the appellant. It is also likely, though I cannot be sure, that that notice took the form of the issue of a paper income tax return SA 100. There are no special returns for non-residents mentioned on HMRC's website, so the normal self-assessment return for non-residents is the same SA 100 as residents use.

43. I examined the 2014-15 SA 100 on the HMRC website to see if anything was said in this return, or in the Notes that would have accompanied it, about NRCGT gains and the need to make a separate return.

44. There is nothing, presumably because the forms are dated December 2014, the month in which legislation on NRCGT but not including on the returns had been issued in draft only.

45. I have also looked at the 2015-16 return which is the one that the appellant would have been issued with on 6 April 2016 and which she was completing a few months later when she came across a reference to the NRCGT return for the first time.

46. There is nothing in the return itself (Pages TR 1 to TR 8) about NRCGT gains. Page TR 2 asks the person completing it whether they need to complete the "Capital Gains Summary" page and says that they may need to if they "sold or disposed of any assets (including, for example, … land and property ..)"

47. Page TR 2 also asks the taxpayer:

> "Were you, for all or part of the year to 5 April 2016, one or more of the following:

• not resident”

48. The Notes for Completion of the Tax Return refer to the Capital Gains Summary pages and say that a person should complete them, among other things:

> “□ you sold or disposed of chargeable assets which were worth more than £44,400
>
> □ you sold or disposed of an interest in a UK residential property and were not resident in the UK or you were a UK resident and overseas during the disposal.”

both of which applied to the appellant. The Notes also refer to residence by saying:

> “You should fill in the ‘Residence, remittance basis etc’ pages if you:
>
> - are not a UK resident”

49. The relevant CGT pages are the supplementary pages SA 108. Page CG2 at box 37 says:

> “If you have submitted a Non-resident Capital Gains Tax return for the disposal of a UK residential property or properties during 2015-16, put ‘X’ in the box”

50. The Notes for completing the SA108 Capital Gains Summary repeat the statement at §48 *but also says*:

> “You don’t need to fill in the ‘Capital gains summary’ pages if you only sell or dispose of:
>
> - your main home, if you qualify for Private Residence Relief on the full amount of the gain.”

51. Under the heading “Land and property” on Page CGN 4 it says:

> “Property and other assets and gains
>
> If you completed a Non-resident Capital Gains Tax (NRCGT) return because you disposed of an interest in a residential property situated in the UK when you were either not resident in the UK or the disposal was made in the overseas part of a split year, complete boxes 30 to 38 with the final details even if you chose to pay the Non-resident Capital Gains Tax at the time of disposal.
>
> If you chose to pay the Non-resident Capital Gains Tax at the time of disposal, enter:
>
> - the amount of Non-resident Capital Gains Tax paid as a minus figure in box 8
> - the NRCGT reference number under which the payment was made in box 38 [*White space*]

For more information on Capital Gains Tax for non-residents, go to www.gov.uk/guidance/capital-gains-tax-for-non-residents-uk-residential-property"

52. And on CGN5 it says:

"**Box 37 If you have submitted a Non-Resident Capital Gains Tax return for the disposal of a UK residential property**

If you completed a Non-Resident Capital Gains Tax return for any disposal in the year put an 'X' in box 37 and the reference number of each Non-Resident Capital Gains Tax return in box 38."

53. As to the Non-resident pages on SA 109 on page RR1 of the form there is a box for indicating if the person completing it is non-resident for the tax year and others for giving information about the country of residence and double taxation relief.

54. The notes for completing the SA109 indicate that it is not possible to attach them to an online return and that commercial software is required to submit them online.

55. But neither the SA 109 or the Notes for completing it refer in any way to NRCGT gains.

Discussion

Burden of proof

56. In the ordinary case of an appeal by a taxpayer against an amendment to their self-assessment it is long established that the burden of displacing the amendment (and, before 1996, an assessment) is on the appellant.

57. There are however circumstances where it is accepted that the burden is on HMRC. Where in the case of discovery assessments, those made under s 29 TMA or paragraph 41 Schedule 18 FA 1998, it is necessary to show that one of the two conditions for making a valid assessment are met, the burden is on HMRC (see *Household Estate Agents Ltd v HMRC* [2007] EWHC 1684 (Ch) per Henderson J (as he then was) at [48]).

58. And it is clear from any number of cases (but *Khawaja v HMRC* [2012] UKFTT 183 (TC) is a recent example) that where HMRC have to show fraud, neglect or their modern counterparts, deliberate conduct or carelessness, the burden of proof is on HMRC.

59. The penalties in this case and in nearly all appeals under Schedule 55 (a penalty under paragraph 6(3) is one exception) do not involve any of the types of conduct mentioned in §58. But there has to be a "failure" shown and it seems accepted, not least by HMRC, that in a failure case the burden remains on them. This may be because a failure within Schedule 55 must inevitably involve some carelessness or the appellant would have a reasonable excuse and there would be no liability.

60. By contrast where HMRC show to the Tribunal's satisfaction that the penalty has been properly imposed, the evidential burden passes to the appellant to show that

she has a reasonable excuse or that HMRC's decision about whether to give a special reduction is flawed.

61. I first then consider HMRC's case that the penalties were validly imposed.

Was there a failure to file by the filing date?

5 62. 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.

63. 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 10 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."

64. That day was 23 March 2015. As a result Schedule 55 so far as it applied to a 15 failure described in item 2A was in force in relation to the appellant's failure to file an NRCGT return before the filing date.

65. 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 7 July 2015 making the filing date 6 August 2015. The return was therefore late as it was delivered[6] 20 electronically on 7 August 2016.

Is electronic communication and delivery permitted?

66. I pause here to note that I said it was delivered electronically because it seems that that is the only way it can be done.

67. To make and deliver an NRCGT return it is necessary to go to a page on 25 HMRC's website[7], and complete the online form headed "Non-resident: Report and pay Capital Gains Tax on UK residential property". It contains the text:

> "**Please note:** You must notify HM Revenue and Customs (HMRC) within 30 days of the date the property is conveyed and confirm payment details. Failure to notify HMRC and pay on 30 time may result in penalties and interest."

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[6] Paragraph 1 Schedule 55 penalises a person who fails on time to "make *or* deliver". Sections 8(1), 8A(1) and s 12ZB(1) TMA require a person to "make *and* deliver", while paragraph 3(1) Schedule 18 FA 1998 (corporation tax return) only requires delivery. No doubt HMRC would not accept an argument from a taxpayer that they "made", in the sense of completing the boxes etc, their return before the due date even though they delivered it, by submitting it, after that date, and so should not be penalised.

[7] Not particularly easy to find. The steps are: from the homepage of HMRC on "www.gov.uk" click on "All HMRC services and information". At the entries for CGT click on "see more". In the entries for "Property" go to "Capital Gains Tax for non-residents: UK residential property". That takes you to the page originating on 6 Aril 2015 discussed in the main text. Then click on the hyperlink in the underlined words "you need to tell HM Revenue and Customs" or "non-resident Capital Gains Tax return".

68. Nowhere does it indicate that a paper return may be made in lieu of filling in the online return.

69. Section 115[8] TMA and regulations made under s 132 FA 1999 govern the methods by which a statutory notice to HMRC may be delivered.

5 70. Section 115(1) refers to the default method which is actual delivery by hand.

71. Section 115(2) allows any notice under the Taxes Acts to be delivered by post.

72. Section 132 FA 1999 permits online delivery of returns by the taxpayer concerned and is the basis for the familiar and predominant method currently used for the purpose of electronically filing a return under s 8(1) TMA.

10 73. The relevant regulations are the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) ("ICTECR"). Regulation 2 defines the scope of the regulations:

> "(1) These Regulations apply to—
>
> (a) the delivery of information, to or by the Board, the
> 15 delivery of which is authorised or required by or under—
>
> (i) 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,
>
> 20 …"

74. The list in regulation 2(1)(a)(i) ICTECR does not include s 12ZB TMA.

75. Regulation 3 contains the conditions a person must meet in order that they may make electronic delivery of a matter within regulation 2(1), and it also specifies the different conditions for delivery of a mandatory return under Schedule 18 FA 1998
25 (Corporation Tax return).

76. Such a person may only use a method of electronic communication authorised in a direction made by the Commissioners for Her Majesty's Revenue and Customs and such a direction was made on 4 April 2008 specifying the Internet.

77. Since s 12ZB TMA is not included in the list in regulation 2 ICTECR the
30 question arises as to the legal consequences, if any, of the non-inclusion. One possible consequence would be that a return has still not been "delivered" to HMRC, but that would not matter in this appeal as it is common ground that the relevant details of the disposal were given more than 12 months after the filing date, so no further penalties could arise.

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[8] Current versions of TMA also include s 115A and Schedule 3A. They were enacted in FA 1995. They permit electronic delivery of certain tax returns, those specified in a Treasury Order. The returns specified include those under s 8(1) TMA but not those under s 12ZB TMA. Schedule 3A required a person to use what is called the Electronic Lodgement Service ("ELS") of HMRC, which had to be established by an authorised user, normally a firm of accountants. ELS ceased to be available from 31 March 2006, although the legislation has not been repealed.

78. Another consequence could be that a filing on paper would have to be accepted by HMRC if it showed all the information requested in the website notice, which was presumably the information prescribed by the Commissioners for HMRC under s 113(1) TMA for an NRCGT return[9]. A paper filing might, as is shown in this case, be difficult, given the 30 day deadline[10], but a late paper filing might well give rise to a reasonable excuse.

79. Since there appear to be no obvious consequences of the failure to list s 12ZB TMA in regulation 2 ICTECR I take the point no further in deciding the outcome of this appeal. It would be a sensible move for HMRC to regularise the position, unless they think I am completely wrong.

Liability to penalties: the face value position

80. Because of the failure to deliver a return by the filing date, the appellant became liable to a penalty of £100 under paragraph 3.

81. The return was 3 months late after 6 November 2015 so the appellant then became liable under paragraph 4 to a penalty of £10 per day for 90 days, the total penalty being £900.

82. The return was 6 months late after 6 February 2016 so the appellant then became liable under paragraph 5 to a penalty of the greater of £300 or the tax shown in the return, the penalty charged being £300 (as the tax shown was nil).

83. The return was 12 months late after 6 August 2016, the day before it was delivered, so the appellant then became liable under paragraph 6 to a penalty of the greater of £300 or the tax shown in the return, the penalty charged being £300 (as the tax shown was nil).

The liability to penalties: detailed consideration of paragraph 4, 5 and 6 penalties

84. The paragraphs 4, 5 and 6 penalties, particularly the paragraph 4 one, require some more detailed consideration than the paragraph 3 one. Unlike paragraphs 3, 5 and 6, paragraph 4 contains certain safeguards for the taxpayer before HMRC can impose daily penalties. The uniqueness of these safeguards in the "new" penalty legislation introduced in FA 2009 has been remarked on in this Tribunal, but only in my dissenting opinion in the decision in *Morgan & another v HMRC* [2013] UKFTT 317 (TC) at [176] ("*Morgan* - "another" was in fact Mr Keith Donaldson who appealed against the decision). What that decision did not discuss was the reason for including these unique safeguards.

85. The reason is plain from an examination of the Consultative and other Documents published between 2006 and 2009 by HMRC in their review of HMRC's powers[11]. Paragraph 4 directly replaced the daily penalties that could be imposed by

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[9] I haven't sought to discover whether the return had been validly prescribed. I follow here the old Latin maxim "Omnia praesumuntur rite esse acta" or the presumption of regularity – see *Regina v Commissioners of Inland Revenue ex parte TC Coombs & Co* 64 TC 124 per Lord Lowry.

[10] The days of a three month deadline for non-residents as in for example the proviso to s 42(3) TMA as originally enacted are long gone, no doubt as a result of the coming into widespread use of airmail.

[11] See in paras 7.36 and 7.37 and Question 8 in the document "Meeting the obligations to file returns and pay tax on time" 19 June 2008 and, in particular paras 5.7 to 5.9 of the Responses document of 13

s 93(3) TMA 1970. Those penalties were not fixed but could be up to £60 per day. But before HMRC could impose such a penalty it had to seek the approval of the General or Special Commissioners.

86. The replacement for the safeguard, of an independent body scrutinising HMRC's decision to impose the penalties, was the requirement in paragraph 4(1)(b) Schedule 55 on HMRC to make a decision to impose the paragraph 4 penalties. This was in the context of Schedule 55 penalties being generally imposed automatically by an algorithm in HMRC's SA computer.

87. The decision by casting vote in *Morgan* was that this requirement on HMRC to make a decision before imposing the daily penalty was satisfied by a decision of a committee of HMRC officials before Schedule 55 came into force that daily penalties would be sought in *all* cases. The decision in *Morgan* was upheld by the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*").

88. But that policy decision could not have been one to resolve to impose daily penalties in respect of failures to make or deliver returns not listed in the Table, and not envisaged, when Schedule 55 was originally enacted. HMRC have in this case put forward no evidence of any general policy decision by any committee of HMRC officials to seek daily penalties in all NRCGT cases (nor I assume in ATED, bank payroll tax or apprenticeship levy cases where the failures to make returns have been added, or deemed to be added, to the table in paragraph 1 Schedule 55 since enactment[12]), so the position reverts to the one I mistakenly thought in *Morgan* was the case for income tax returns, that a positive decision must be made by an officer of HMRC to assess the daily penalties.

89. In the NRCGT return case it is very unlikely that any officer of HMRC will know that a return is outstanding until it is filed. But they would have an opportunity after the filing of the return to make a decision of the paragraph 4(1)(b) sort, but there is no evidence that any officer in the NRCGT Team did so, whether the actual (unnamed) officer who made the assessment or not.

90. Consequently the paragraph 4 penalty cannot stand. It could not anyway stand as the condition in paragraph 4(1)(c) was not met. That requires HMRC to notify the starting date for daily penalties before the assessment is made (see *Taliadoros-Hichri v HMRC* [2017] UKFTT 512 (TC) (Judge Jonathan Richards)). There is no evidence put forward that any communication was made with the appellant before the assessment was made and notified.

91. It is of course the case, as has been noted, that HMRC purported to withdraw the paragraph 4 penalties in this case. They did this on 25 April 2017. On 14 July 2017 HMRC updated the webpage "Capital gains tax for non-residents: UK residential property" (see §§38 to 41) specifically on penalties. The text in §40 was replaced by:

February 2009 (which refers to the proposal to impose "modest" [*sic*] daily penalties).

[12] See paragraph 7 Schedule 34 FA 2013 for ATED, s 113(6) and (17) FA 2016 for the apprenticeship levy and paragraph 38 Schedule 1 FA 2010 for the bank payroll tax.

"**Penalties**

You have 30 days from the date of conveyance to report your disposal on the non-resident Capital Gains Tax return and pay any tax due. You'll get a late filing penalty if you don't do this by the 30 day deadline.

If you miss the deadline by:

- up to 6 months, you will get a penalty of £100
- more than 6 months, a further penalty of £300 or 5% of any tax due, whichever is greater
- more than 12 months, a further penalty of £300 or 5% of any tax due, whichever is greater

…"

92. The daily penalties are not mentioned, but no reason for the change is given. There has been some publicity about withdrawal of daily penalties for NRCGT failures, though not by HMRC. In a Tax News Forum on the Institute of Chartered Accountants of England and Wales ("ICAEW") website, a question was asked on 1 September 2016 about the penalties imposed for the failure to deliver a NRCGT return.

93. On 16 April 2017 another post in the same thread said:

> "I have copied below a post from another thread on another forum which suggests writing to your MP can lead to a reduction in penalties. This is perhaps the biggest indication yet that the Government realises these penalties are unjust.
>
> Thank you […], we have asked HMRC to review our failed appeal and if that also fails we will ask for a tribunal. Our MP wrote to HMRC on our behalf and *they say that they will refund some of the daily penalties* but so far we have not heard anything from them ourselves so we do not yet know by how much this will reduce the fines."

94. Several more posts reported that daily penalties were being cancelled in their cases. But no one reported any reasoning from HMRC for their change of mind.

95. That change of mind may have been because of another posting on the same forum. On 11 January 2017 a post was made to the forum which said:

> "Is Para 4 of Sch 55 FA 2009 not relevant. It says HMRC must give notice. Notice means being forewarned which is not possible in the case of NRCGT returns so how can a penalty be legally applied. I did appeal on these grounds and HMRCs reasons for rejecting the appeal were – 'based on the penalty notice issued to you and the fact HMRC couldn't advise you of daily penalties until after their NRCGT was filed I reject your appeal.'"

96. However on 5 July 2017 ICAEW Tax Faculty issued a news item which said:

“**Late NRCGT returns – HMRC will not charge daily penalties**

ICAEW has received clarification from HMRC on its approach to charging penalties for failure to submit Non-Resident Capital Gains Tax (NRCGT) returns. Specifically, it is using its discretion not to charge daily penalties.”

…

The clarification from HMRC states:

“The penalties for the late filing of an NRCGT return are in line with late filing penalties for other types of return; the amount of penalty applicable depends on the degree to which the return is late:

- there is an initial penalty of £100 in all cases;
- plus a further penalty of 5% of the tax due or £300 if greater for returns over six months late;
- plus a further penalty of 5% of the tax due or £300 if greater for returns over 12 months late.

Additionally, HMRC has discretion to charge penalties of £10 per day for returns that are filed between three and six months late.

These penalties can be appealed if there is a reasonable justification for the return being late.

Following representations from a number of customers and agents HMRC has reviewed its position with regard to the £10 daily penalties. HMRC can confirm that it no longer issues these penalties for late NRCGT returns and past penalties will be withdrawn” [My emphasis]

97. That then is the reason. HMRC have a discretion, they say, not to impose the daily penalties. This must I assume be a reference to paragraph 4(1)(b) Schedule 55.

98. Turning finally to the paragraph 5 and 6 assessments they are however valid, as no question of paragraph 24 Schedule 55 (which does require an officer’s intervention) being applied arose, as the return was received before the assessment was made.

The assessments – the paragraph 18 requirements

99. Paragraph 18(1)(a) Schedule 55 makes it mandatory to assess any penalties to which a person is liable. That has been done here.

100. Paragraph 18(1)(b) requires HMRC to notify the person: that has been done in the letter including the notice of assessment of 6 September 2016.

101. Paragraph 18(1)(c) Schedule 55 says that that notice must state “the period in respect of which the penalty is assessed” (“assessment period”). This is more problematic.

The period in respect of which the penalty is assessed

(a) The relevant year of disposal

102. HMRC's assessments were presumably made on the day the notice of them was issued, 6 September 2016.

103. The notice states that the assessment period is that from 6 August 2015 to 7 August 2016. This is incorrect. What the assessment period means, as can be seen from the interpretation paragraphs of the same wording in Schedule 24 FA 2007 and Schedule 41 FA 2008, is the tax year or other period in respect of which the return is to be made.

104. In this case s 12ZB(7) TMA says that it is the tax year in which any gains on the non-resident CGT disposal would accrue. The problem I have in this case is that I do not know what that tax year is. For the purposes of CGT a disposal takes place when a contract is made, not on completion – s 28 Taxation of Chargeable Gains Act. The NRCGT return shows two relevant answers. To the question when was the "Date of conveyance (ie legal transfer of title)" the answer is "7 July 2015". To the question above it, which is "Date of disposal (eg date sold/given away)" the answer is also "7 July 2015".

105. There are two possible interpretations of the answer to this second question. If the question was interpreted correctly by the appellant as requiring the date of the contract (ie exchange) then it would be a very unusual example of the sale of the freehold of a residential property where exchange and completion were on the same day.

106. The other interpretation is that the appellant assumed the question was asking for the date of completion. A lay person may well not have appreciated they were being asked in this part of the return for the date when contracts were exchanged.

107. I consider that it is more likely than not that the answer given about the date of disposal is not the contract date. I therefore cannot say, and HMRC have not established, when the contract date was. It could have been before 6 April 2015.

108. If the contract date was before 6 April 2015 then there can be no "non-resident CGT disposal" as s 14B TCGA 1992, which defines that term for the purposes of s 12ZB TMA, does not have effect for any tax year before 2015-16, and neither does the rest of sections 12ZA to 12ZN TMA.

109. Whether the contract date was before 6 April 2015 or not is of course irrelevant to the appellant in terms of when and how much CGT to pay as there was, or could have been, no gain. But it is far from irrelevant when deciding whether a penalty has been properly imposed, and as the burden is on HMRC to show that it was so imposed and they have failed to show that it was, the penalties must be cancelled, and the appellant's appeals succeed .

110. However in case I am shown to be wrong on appeal, I continue to consider the issue of whether the penalties were properly imposed on the assumption that the contract was made in 2015-16, the correct assessment period.

(b) the period in respect of which the penalty is assessed

111. On the assumption that the disposal was in 2015-16 the question is whether the statement on the notice of assessment that the assessment period was "6 August 2015 to 7 August 2016", instead of the tax year 2015-16, invalidates the assessment of the paragraph 3, 5 and 6 penalties.

112. In relation to paragraph 4 penalties the position is somewhat different from that for the other paragraphs, 3, 5 and 6.

113. I turn to paragraph 4 first as the meaning of the "period in respect of which the penalty is assessed" has been the subject of authoritative decision in relation to that paragraph. We are told by the decision of the Court of Appeal in *Donaldson* at [25] and [26] that when it comes to paragraph 4 penalties:

> "25. … 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 … 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."

114. In this case neither the start date nor the end date of the 90 day penalty period was given. In *Donaldson* the omission to state the period was rescued by s 114(1) TMA. At [29] Lord Dyson MR said:

> "29. In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-

> 11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice. I do not, therefore, need to consider the further argument advanced by Mr Vallat based on section 114(2) of TMA."

115. Thus to meet the requirements of paragraph 18(1)(c) a notice of a paragraph 4 penalty must specify as the period referred to in paragraph (c) of paragraph 18(1) the date from which the penalty is payable to the end date. In this case no such date or period is specified.

116. The discussion in [29] of *Donaldson* seems to be predicated on the fact that SA Reminders and the notice of assessment, which in the context of that case must be a reference to the separate notice in *Donaldson* of the £100 penalty, informed Mr Donaldson that he could become liable to penalties of £10 per day for 90 days. There were it seems no such reminders here and no previous assessment warning of the daily penalties.

117. All that the notice of assessment said was:

> "For returns received more than 3 months late a daily penalty of £10 per day will be charged for up to 90 days"

and

> "You have been charged … a daily penalty of £10 per day for the maximum 90 days."

118. The question is: can the period be worked out without difficulty? I do not think so. Nothing in paragraph 4 suggests that the start date had to be the date 3 months from the filing date – it cannot be before that date (paragraph 4(3)(a) Schedule 55). It cannot be worked out at all from the sparse information given by the notice. But it is difficult to see how the appellant has been misled or confused, because there was no contact with her during the period of one year and one day following the filing date, unlike the position with penalties for failure to make a return. In my view then s 114(1) TMA does validate the paragraph 4 penalty notice.

119. And I would say that the error in the "period in respect of which the penalty is assessed" in relation to the paragraphs 3, 5 and 6 notices is also similarly rescued as

the mistake did not, and did not have the capability to, confuse or mislead the appellant.

120. I do not then need to consider to what extent a notice of assessment which assesses four different things might be invalidated by a non-rescuable mistake or omission in relation to one or more but not all of them.

Other assessment requirements

121. The specific requirements in paragraph 18(1) are met. It is then necessary to see that the requirements of TMA in relation to assessing procedure are met, given paragraph 18(3)(a) Schedule 55. The assessing procedure rules in TMA are in s 30A. They are that:

(1) the assessment has to be made by an officer of HMRC – s 30A(1)

(2) the notice must state the date it is issued – s 30A(3)

(3) the notice must indicate the time limit for appealing – s 30A(3).

122. I have no evidence to show that the assessment was made by an officer of HMRC, as the letter notifying the assessment was anonymous. But I am prepared to assume that whoever it was going under the name "NRCGT Team" was an officer of HMRC.

123. The date is shown on the letter.

124. The notice informs the recipient that an appeal must be made within 30 days.

125. The time limit for making an assessment to penalties is given by paragraph 19 Schedule 55, and is the later of Date A and Date B.

126. Date A is in this case 6 August 2017 (two years from the actual date of delivery), so the assessment was in time.

127. I conclude that the paragraph 3, 5 and 6 assessments are valid, or would be if the gains had accrued in 2015-16.

The appeal

128. Paragraphs 20 and 21 deal with appeals against Schedule 55 assessments. An appeal may be made against liability or the amount of the penalty. In this case the appeal was against liability. There is no issue about the amounts, unless by implication the appeal notice contends that there should be a special reduction.

129. Paragraph 21 provides that unless otherwise expressly provided in Schedule 55, the appeals provisions for the relevant tax type apply. The tax type is CGT so the appeals provisions in TMA apply.

130. Section 31(1)(d) TMA is disapplied by paragraph 21 Schedule 55 because paragraph 20 expressly does the same job.

131. Section 31A(1) TMA requires that a notice of appeal be given in writing and to the relevant officer of HMRC. That officer is the officer who notified the assessment.

132. This then presents a difficulty for the appellant. She could not have known who that officer was as they were anonymous. However HMRC have accepted the appeal as properly given under s 31A(1). I leave for another time the question whether an anonymous notice of assessment is a valid one.

133. The notice of appeal must specify grounds. This it did.

134. The appeal was dated 21 October 2016. There is no record of when it was received by HMRC in their Leicester office (to which the appellant had written, perhaps because she filed her income tax returns in that office and was aware of an officer with a name there).

135. HMRC have taken no point about its lateness despite the notice of assessment being dated 8 September 2016, probably because the appellant said she did not receive this notice until six weeks after that date.

136. Finally, s 55 TMA (postponement of tax) has no effect as paragraph 21(2)(a) Schedule 55 expressly suspends collection of any penalty appealed against.

The review

137. By virtue of paragraph 21(1) rights to a review and the relevant procedures in sections 49A to 49I TMA are attracted.

138. The notice of assessment informed the appellant that she could ask for a review. Although she did not expressly ask for one, HMRC took her letter of 14 February 2017 as requesting one.

139. The next step should have been a letter from HMRC notifying the appellant of their view of the matter (s 49B(2) TMA). I cannot see that this was done.

140. Nonetheless HMRC did review the decision to assess. They do not appear to have asked the appellant for any representations (s 49E(4) TMA). The reviewing officer did however notify her conclusions and reasoning, which was to cancel the assessment under paragraph 4 and to uphold the assessments under paragraphs 3, 5 and 6 Schedule 55.

141. This conclusion has no legal validity as it was not notified within 45 days of the "relevant day", the day HMRC's view of the matter was given, as no such view had been given and so the 45 days has not started to run (s 49E(6) and (7) TMA).

142. Had the review been a valid one, the cancellation of the paragraph 4 penalty would have taken effect unless the appellant had notified an appeal to the tribunal. Since the appellant did so notify there could have been no deemed s 54 TMA agreement of the cancellation under s 49F(2) TMA and so the paragraph 4 penalty would not have been cancelled (the rule in s 30A(4) TMA that an assessment may not be varied except under any provision in the Tax Acts applying by virtue of paragraph 18 Schedule 55).

143. As the review had no legal effect, then *a fortiori* the paragraph 4 penalty was not cancelled and the appeal against it is properly before the Tribunal. In her

notification to the Tribunal the appellant had put the amount of the penalty as “£700 (after review)”, so I treat it as against the amount of £1,600.

144. The appellant also completed Part 6 of the Notice of Appeal to the Tribunal seeking the Tribunal’s permission to notify the appeal late.

5 145. She says the latest time for notification was 27 May 2017, which I assume is her calculation of 30 days from the date of the review conclusions letter of 25 April 2017, but 30 days is in fact 25 May. The Notice is dated 17 May 2017 but the appellant pointed out that the review letter reached her on 15 May, which gave her insufficient time to prepare a response that could be received within 30 days.

10 146. Yet the bundle shows that the Tribunal received the Notification on 19 May by email. I think the appellant is simply a bit confused about the 30 days. It is irrelevant anyway as the invalidity of the review means there is in fact no time limit for notifying the appeal.

The grounds of appeal

15 147. The appellant said in her notification of her appeal to the Tribunal that:

(1) She had assumed that when the time came to sell the property and she was subject to CGT it would be covered by her self-assessment return.

(2) She was late in filing the NRCGT return because when addressing her return for 2015-16 issued to her after the end of that tax year she only then
20 discovered a separate filing was required and filed the return immediately.

(3) Despite the review officer saying the information about penalties was in the public domain and was widely available, and that it was her responsibility to find out about it, she says that she was not prompted to search for the legislation that requires submission within 30 days because she expected the income tax
25 return to be the place to report the disposal.

(4) She was not aware of the separation of NRCGT and NR Self Assessment as the Self assessment return includes a section for CGT – why would she look elsewhere she asks rhetorically.

(5) She would expect a penalty to be applied for evasion or avoidance of
30 payment, not where a reasonable, honest accidental and understandable delay has occurred that has been rectified at the earliest opportunity.

(6) The penalty appears to be in the context of a punishment imposed or incurred for a violation of law or rule. She does not believe this is the situation or that she deserves punishment.

35 ***HMRC’s response***

148. In its contentions in the SoC HMRC say (verbatim):

(1) The appellant did not take care to avoid the failure to ensure that their[13] [*sic*] NRCGT returns were filed within the 30 day limit.

(2) The new legislation was announced in the Chancellor's Autumn Statement in December 2014. This was followed up by Capital Gains Tax for Non-Residents: UK Residential Property, which was first published on 6 April 2015 on HMRC's website. That was many months before the disposal on 7 July 2015.

(3) The appellant had an obligation to stay up to date with legislation affecting her activities within the United Kingdom. On the sale of her property HMRC would expect her, acting as a prudent person, exercising reasonable foresight and due diligence, having proper regard for their [*sic*] responsibilities under the Tax Acts to have researched what is expected regarding her tax obligations.

(4) Ignorance of the law is not considered a reasonable excuse

(5) Therefore the appellant has no reasonable excuse.

(6) HMRC have considered that the appellant was not aware that a NRCGT return was required 30 days after the date of disposal, and that she thinks penalties should not be applied where an honest mistake has been made. They do not consider that these are special circumstances.

My examination of the grounds and HMRC's response – reasonable excuse

149. Paragraph 23(1) Schedule 55 provides that:

> "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."

150. If liability does not arise then the assessment must be cancelled.

151. In *Perrin v HMRC* [2014] UKFTT 488 (TC) (Judge Anne Redston and Mrs Leslie Stalker) the Tribunal set out the approach that should be taken to arguments by a taxpayer that they have a reasonable excuse for not filing a return on time:

> "86. In *Coales v R&C Commrs* [2012] UKFTT at [26] Judge Brannan considered the similar wording at TMA s 59C(9) in the context of VAT default surcharge, and said that the reasonable excuse exception was 'an objective test applied the individual facts and circumstances of the appellant in question.' At [31] he continued:
>
> > 'Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. The word 'reasonable' imports the

[13] Singular "they" is perfectly acceptable usage these days (and in fact always has been) but not when the gender of the person concerned is obvious. At least it is better than "it", which I seen used more than once in an HMRC SoC on late filing penalties where the person assessed is an individual.

> concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than some hypothetical) taxpayer.'

87. At [28] he adopted the summary of Judge Medd QC in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 who said that in deciding whether a reasonable excuse exists:

> '…the first question that arises is can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it can not. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

88. We respectfully agree with both judgments. They are, in our view, as applicable to Schedules 55 and 56 as they are to default surcharge. To be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

and

"99. The task of this Tribunal combines the tasks of judge and jury: we must decide whether 'there is a reasonable excuse for the failure.' We agree with Judge Medd and Judge Brannan that the correct way of doing this is to ask:

> 'was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

100. It is on that basis that we approach this case. When we refer to 'the reasonable taxpayer' we are using that phrase as shorthand for 'a responsible person with the same experience and other relevant attributes of the taxpayer and placed in the same situation as the taxpayer."

152. I agree entirely with this decision and follow the approach it sets out in this case. I add that the SoC correctly sets out the test described in *Perrin* and elsewhere,

and does not repeat the incorrect statement in the response to the appeal that is still, in 2016, wrongly based on the minority judgment of Scott LJ in *Steptoe*.

153. What then is the experience and other relevant attributes of the appellant? She had had experience, probably for three years or so, of filing returns under s 8 TMA ("SA return") to include the residence pages (SA108). She was aware that she had made a disposal of land in the United Kingdom and she said she knew that this was reportable on her 2015-16 return. On that last point she is I think mistaken, because the Notes to the SA108 say that a gain exempt as a result of PRR need not be returned.

154. But the question here does not concern any failure to deliver the ordinary SA return. It concerns her failure to file the NRCGT return. That return was in its first tax year of operation, having been introduced by legislation which was promulgated in March just before the start of that same year 2015-16. Was it reasonable for her to think that she would only need to return the gain on her SA tax return?

155. HMRC say that she did not take care to avoid the failure to file. I assume they mean to qualify that to say the she did not take reasonable care. HMRC say that, in this context, she had an obligation to stay up to date with legislation affecting her activities within the United Kingdom and on the sale of her property, acting as a prudent person, exercising reasonable foresight and due diligence, and having proper regard for her responsibilities under the Tax Acts to have researched what is expected regarding her tax obligations.

156. They do not state the source of this obligation. It is not in the law. "Your Charter", the ill-named successor to the Taxpayer's Charter, says merely "Please take care to avoid mistakes when you send us information, pay your taxes and claim any payments or reliefs."

157. The appellant must have done some research or been told by someone that there was a potential liability to CGT which had not existed before 6 April 2015, although she does not say when she became aware of this change. As an experienced filer of SA returns she would expect that the returns and the Notes accompanying them to refer to new legislation that affected her, and they did (see §§45 to 55). But when she read, or first had the opportunity of reading them, it was too late.

158. What she did is though, for HMRC, not enough to amount to taking reasonable care to avoid mistakes. By referring to "the new legislation" announced in the Chancellor's Autumn Statement in December 2013 (not 2014 as the SoC has it), followed by a reference to "Capital Gains Tax for Non-Residents: UK Residential Property" first published on 6 April 2015 on HMRC's website, "many"[14] months before the disposal on 7 July 2015, they are implying strongly that a non-resident with a UK residential property should have been following the development of the legislation intently from its genesis to its enactment and from then to find and read all the information provided by HMRC on their website.

[14] I disagree with HMRC's characterisation of three or four months as "many" months in this context, or in any other. It is a "few months".

159. I am sure that every December in the past few years the appellant, like many other inhabitants of Rozelle, NSW, Australia, has been agog with excitement waiting for the British Chancellor of the Exchequer's Autumn Statement. How much more relevant must it be to their tax affairs than anything the Australian Treasurer has to announce.

160. That this "contention" by HMRC, that the new legislation had been announced in the Autumn Statement (with the implication that it was reasonable for the appellant to know this and unreasonable not to have known it) was seriously advanced by HMRC as a ground for denying the appellant had a reasonable excuse for not knowing about the NRCGT return deadlines, is a prime example of the concept of "nerdview": a phrase coined by Professor Geoff Pullum of Edinburgh University. Only a small coterie of people obsessed by tax (of which I am no doubt one) would admit that the Chancellor's Autumn Statement on tax matters is something that should register in anyone's consciousness. This is particularly so when the 2013 Autumn Statement contained no detail at all about NRCGT, especially about any return provisions.

161. I am willing to be charitable to Mrs J Gardiner who wrote the SoC and assume she was only saying what the NRCGT Team had passed on to her. Otherwise I would be maligning her by suggesting that the SoC on this point was so much claptrap.

162. There was not even anything in the actual Autumn Statement in Parliament on 3 December *2014* by the Chancellor about NRCGT. There is nothing in the Green Book for that year about NRCGT. There is nothing on HMRC's website for the Autumn Statement 2014 about NRCGT.

163. What did happen in 2014 about NRCGT was that on 28 November 2014 (not the Autumn Statement) HMRC issued a notice about the responses to a consultation issued in March 2014 about NRCGT. This consultation followed an announcement by the Chancellor in his Autumn Statement in 201<u>3</u>.

164. Ms Corbett, the reviewing officer, knew this because she said as much to the appellant. The SoC does not exhibit reasonable care when it gave the Tribunal incorrect information. But HMRC expects a non-resident living in a suburb of Sydney to be more knowledgeable about UK tax consultations than their own staff.

165. The first item containing details about the NRCGT return and the deadlines for it is in the FAQs published in March 2015 followed up on 6 April by the document HMRC refer to in their SoC. They expect that all those non-residents who own residential property in the UK to familiarise themselves with this documentation, but do not explain how the average taxpayer, not a tax professional or conveyancing solicitor, could expect to know about the existence of the webpages, let alone find them.

166. The forum on the ICAEW website which I referred to at §92 indicated that, in response to complaints about the return, the HMRC CEO Jon Thompson had referred to two other sources of information about the NRCGT return which taxpayers might be expected to see. The first was "Agent Updates". Update number 46 says at page 2:

> “**Capital Gains Tax for non-residents - sales and disposals of UK residential property**
>
> From 6 April 2015 if your clients are not resident in the UK and sell or dispose of a UK residential property they will need to let HMRC know within 30 days of doing so[15] and may have to pay some capital gains tax (CGT) on the gains. This change will affect a range of non-resident customers.”

167. Update 47 also on page 2 said:

> “From 6 April 2015 if your clients are not resident in the UK and sell or dispose of a UK residential property they will need to let HMRC know within 30 days of conveyance and may have to pay some Capital Gains Tax on the gains.”

168. Update 51 said:

> “**Capital Gains Tax for non-UK residents: sales and disposals of UK residential property**
>
> From 6 April 2015 if your clients are not resident in the UK and sell or dispose of a UK residential property they will need to let HMRC know within 30 days of conveyance, using HMRC’s return. Since the extension to Capital Gains Tax (CGT) was introduced we have listened to our customers and have updated our guidance and tax return in line with feedback received.”

169. All good stuff (save for the matter referred to in fn 15), though there is no reference to penalties for late compliance. But while Updates 46 and 47 were issued in spring 2015, Update 51 was issued no earlier than the end of January 2016, too late for the appellant. And these updates are of course, as the name implies, aimed at agents, not individual taxpayers.

170. The second source of information was apparently Twitter announcements in mid-2016. I cannot say what these announcements said or whether the appellant was using Twitter, and if she was whether she was following HMRC at the time. I suspect not.

171. HMRC says ignorance of the law cannot be a reasonable excuse. HMRC could point to very many statements of the correctness of that contention in decisions of this Tribunal. Occasionally they are qualified by saying that it is not “generally” a defence – see eg *Hendrickson v HMRC* [2017] UKFTT 563 (TC) at [42] (Judge Chris Staker and Mr Andrew Perrin).

172. What would the unusual, not general, circumstances be? It is noticeable that unqualified statements that ignorance of the law is no defence to a penalty occur in situations which are commonplace, such as late filing of ordinary income tax returns, penalties under the PAYE and Construction Industry Schemes and so on.

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[15] This is wrong. It is 30 days from completion, not disposal, which may explain why Update 47 repeated the message with correct information.

173. I am not convinced that this maxim is relevant here. Authoritative statements about the maxim tend to suggest that its operation is confined to criminal statutes, where it does not have the obvious meaning often attributed to it. For example in a case in the High Court of Australia, *Ostrowski v Palmer* (2004) 218 CLR 493, Gleeson CJ and Kirby J said (at 500):

> "Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware of those elements that constituted an offence."

174. HMRC seem to be suggesting the appellant should have been knowledgeable about the law in this area where in my view the subject matter is arcane, difficult to find and counter-intuitive. I consider I have a better than average grasp of tax law and how it is constructed and interpreted.[16] But as I have read sections 7A and 12ZA to 12ZI TMA and the NRCGT provisions in TCGA 1992 my eyes have glazed over and my senses reeled. Do HMRC really think that ordinary taxpayers, even, or rather especially, non-residents, should be expected to understand say s 12ZH TMA on the interaction of NRCGT returns and s 8 returns[17], or to understand the implications for penalties for late filing of NRCGT returns when s 12ZBA(7) says:

> "(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."

175. This does not apply in this case. I now know that after a lot of research. But I do not think it all reasonable for HMRC to expect a non-resident, non-tax expert to know that. I would expect that the ability of anyone in the NRCGT Team to enlighten me as to the meaning of s 159GZZZQ of the Australian Income Tax Assessment Act 1936 would be on a par with the average Australian's ability to construe s 12ZBA or 12ZH TMA.

176. The arguments advanced by HMRC about knowledge of the law are little short of preposterous. To say that information about NRCGT returns is "well within the public domain", as if the public domain had boundaries where one could tell whether something was just in it or well within it or completely within it, is also claptrap.

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[16] The undoubted truth about judicial knowledge is in the statement by Lord Tenterden CJ in *Montriou v Jefferys* (2 Car. & P. 113 (1825)): "No attorney is bound to know all of the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law …"

[17] Any taxpayer attempting to do so should be aware of the wise words of Singleton J in *Briggenshaw v Crabb (HM Inspector of Taxes)* 30 TC 331. After taking two paragraphs to dismiss Mrs Briggenshaw's arguments he added: "Your appeal must be dismissed. I will pass you back your documents. If I might add a word to you, it is that I hope you will not trouble your head further with tax matters, because you seem to have spent a lot of time in going through these various Acts, and if you go on spending your time on Finance Acts and the like, it will drive you silly."

Even assuming that the appellant started to market her property or exchanged contracts after 5 April 2015, it is also preposterous to expect that a document on HMRC's website which is not easy to find for a tax judge makes invalid all possible excuses about not knowing of the NRCGT return deadlines.

5 177. There is a serious deficiency exhibited here in common sense, proportion and an ability to consider the position of what HMRC calls its customers.

178. I do not think that it is unreasonable for a person who knows that they have been making annual SA returns, that those returns require a return of CGT liability, (even if they do not know that the return does not even require a gain exempt because 10 of private residence relief to be returned) and whose own gain is exempt (but is one that they obviously tried to report in their on time return for 2015-16) not to realise that they must file a NRCGT return showing no tax to pay within 30 days of completion, or otherwise to face penalties of £1,600. Why would they?

179. When monthly penalties for non-payment of PAYE were introduced in 2011 15 there were many cases in this Tribunal of people saying "we weren't told". But in all those cases HMRC showed conclusively that they were told – there was a major campaign to enlighten all employers.

180. An obvious cohort of taxpayers who might be subject to NRCGT was those non-residents who filed income tax returns of rents received from UK properties. A 20 targeted communication from HMRC in early 2015, eg when returns for 2015-16 were issued, could have alerted these people to their NRCGT return responsibilities. But there is nothing in the bundle to say that was done: HMRC rely on the Chancellor's Autumn Statement and an obscure document on their website as being something of which the appellant would be expected to be aware.

25 181. The reviewing officer compounded the HMRC errors by suggesting that HMRC do not know who needs a tax return and supplementary pages so there is a requirement to notify chargeability to NRCGT. This is precisely not the appellant's position. Nor is it the law. Section 7A TMA says that the existence of NRCGT liability is not to be taken into account in deciding whether there is a s 7 TMA duty to 30 notify. But the point is that the appellant was on HMRC's radar, she could have been targeted for publicity about NRCGT returns but wasn't. She cannot be blamed for HMRC's shortcomings.

182. I also commend the appellant for working out from the 2015-16 Tax Return CGT pages that she may have needed to file a NRCGT return. The non-resident 35 pages do not give any such indication.

183. I therefore consider that the appellant had a reasonable excuse for not filing a NRCGT return on time.

184. This is sufficient to mean that no penalties are due under paragraphs 3, 5 and 6 even if I am wrong about the need to file a NRCGT return at all. But nevertheless I 40 go on to consider whether were special circumstances.

Can I consider special circumstances?

185. I have said that the appellant appealed against her liability to a penalty, which she clearly did, and my holding that she had a reasonable excuse for her failure is a holding that she was not liable – paragraph 23(1) Schedule 55. I then can cancel the 5 penalty under paragraph 22(1). But were this not the case and I was to consider HMRC's decision about a special reduction, a problem arises.

186. Paragraph 22(3) says I can rely on paragraph 16 (special reduction) in certain circumstances when I am considering whether to substitute a decision that HMRC could have made for the actual decision. But I can only make that substitution if the 10 appeal is under paragraph 20(2), an appeal against HMRC's decision as to the *amount* of the penalty.

187. The appellant does not quarrel with the amount except insofar as she says he had no liability and the amount assessed of £1,600 should be an amount of nil. Even that is problematical because nil is not regarded as an amount – see *HMRC v Apollo* 15 *Fuels Ltd & Ors & Anor* [2016] EWCA Civ 157 per David Richards LJ at [27].

188. But to limit consideration of a special reduction to the paragraph 20(2) case would be to emasculate paragraph 22(3). Penalties under Schedule 55 are essentially fixed. The only variable elements are as to the number of days a daily penalty has been charged if the appellant thinks that number is too large, or whether the penalties 20 under paragraph 5 or 6 have been incorrectly calculated where the relevant percentage of the tax shown in the return is greater than £300, something that can only happen where the tax shown in the return (after tax deducted at source and arguably after payments on account) is £6,000 or more. And it is difficult to see what special circumstances might affect the amount of the penalty in these circumstances.

25 189. I am therefore proceeding on the basis either that the appeal is against the amount as well as against liability or that Homer has nodded in Parliamentary Counsel's office.

190. I am fortified in my view by a consideration of sections 100B and 102 TMA, provisions equivalent to paragraphs 16 and 22 Schedule 55. Under s 102 any penalty 30 could be mitigated, irrespective of the nature and grounds of appeal

Was HMRC's decision about special circumstances flawed?

191. Yes it was. The reviewing officer considered whether there were special circumstances. She said in coming to the conclusion that there were not that she considered the information in the appellant's letter (she does not give a date or say 35 which one) which explained why she disagreed with HMRC's decision.

192. She does not however explain why that information did not amount to special circumstances. This lack of explanation makes the decision flawed in the judicial review sense, and I can therefore consider the issue afresh.

What can be special circumstances?

40 193. Paragraph 16 Schedule 55 does not say what they are. It does say what they are not. Lack of funds to pay is not, nor is the fact that overall HMRC is not out of pocket. HMRC have a policy on special reduction which is set out in their Compliance Handbook at paragraph 170600:

> "Special circumstances are either
>
> • uncommon or exceptional, or
>
> • where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.
>
> To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.
>
> Special circumstances are uncommon or exceptional circumstances that should be clearly recognisable as such and are completely separate from the other considerations mentioned in the bullets above. See CH170800 examples 1 and 2 for examples of special circumstances that may exist as a result of uncommon or exceptional circumstances.
>
> Application of penalty law produces a result that is contrary to the clear compliance intention of that penalty law
>
> We may reduce penalties for special circumstances where imposing the penalties would be contrary to the clear compliance intention of the penalty law. See CH170800 example 3 for an example of special circumstances that may exist where the application of the penalty law produces a result that is contrary to the clear compliance intention of the penalty law.
>
> However, we will not reduce penalties through special reduction where such a reduction would be contrary to the clear compliance intention of the penalty regime. In particular, we will not do so on the basis that the underlying tax liability has been paid.
>
> Note: There is specific guidance for self assessment returns. If the person does not meet SA criteria, whether or not HMRC failed to act on information supplied confirming that a self assessment return should not have been issued, you should cancel the late filing penalties in accordance with the operational guidance."

194. It is instructive to compare this guidance with the guidance about s 102 TMA in HMRC's Enquiry Manual at paragraph 5310[18]:

> "Mitigation will then be considered in three circumstances.
>
> - Where some sort of HMRC maladministration, usually delay, has caused or contributed to the size of the penalty - where delay and/or lack of co-operation by the taxpayer have caused the department additional costs that will weigh against mitigation.

[18] EM5310 is quoted in the Upper Tribunal decision in *Bosher* as to which see §219.

- Where to enforce payment of the penalty would cause the taxpayer genuine and absolute hardship.
- Other exceptional circumstances such as the penalty or penalties being wholly disproportionate to the offence - for example a large tax-geared failure penalty under S93(5) following upon very large S93(3) daily penalties for the same offence, or belated information revealing the type of situation set out at EM5212 ('In-built' penalty)."

195. The first bulleted paragraph was applied as a special circumstance in *Morgan* because Mr Morgan had been effectively instructed by HMRC to make a paper return when making an electronic return would have reduced or removed a penalty. The second bulleted point may now be invalid in the light of the "inability to pay" rule, though the rather coy Example 2 in CH 170800 suggests it might still be a special circumstance. The third bulleted point seems to cover proportionality, a matter considered later.

"Uncommon or exceptional" or "out of the ordinary"

196. HMRC tell us in their SoC that their approach to identifying special circumstances which are uncommon or exceptional reflects the decision in *Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152, where the Court of Appeal held that in relation to an employer's inability to pay redundancy money because of special circumstances, "special" meant "out of the ordinary or uncommon". That meaning has been adopted in many decisions of this Tribunal.

197. How common is it for there to be a situation where a person makes an exempt gain and intends to report it in an on time tax return (though they may not be required to do so) but nevertheless is charged a penalty of £1,600? In my view the situation the appellant found herself in was clearly "out of the ordinary" and "uncommon".

Is the result contrary to the clear compliance intention of the law?

198. The compliance intention behind the insertion of Item 2A into Schedule 55 is very difficult to grasp. This is mainly because s 12ZB TMA seems to have irreconcilable dual purposes. The Condoc of March 2014, the minutes of the Consultative meetings and the Responses document of November 2014 all show that HMRC's initial thoughts were that NRCGT should be subject to a withholding tax. A withholding tax requires a rapid filing and, much more importantly, paying deadline: 30 days[19] seem reasonable (it was "forthwith" originally in the antecedents in DLTA and FA 1969 – see §33) and of course 30 days chimes with the SDLT return under s 76 FA 2003 and payment deadline under s 86 of that Act, and if it had been a withholding tax responsibility for withholding could have been devolved to, especially, the *purchaser's* solicitors dealing with conveyance, as with SDLT.

199. The Responses however pointed out that there were major difficulties with a withholding tax if there was to be a rebasing at 5 April 2015 (as there was). Initially gains would be low to non-existent but would increase over time. This had not been a

[19] Another odd thing about the NRCGT legislation is how difficult it is to see that the payment deadline is also 30 days from completion. I think that the rule must be that in s 55AA(2) TMA, but a less straightforward way of saying it is difficult to imagine.

problem with DLT, but would mean that any rate of withholding would be arbitrary and tend to be excessive. A withholding tax would also be likely subject to exceptions and one obvious one would be where private residence relief was available.

5 200. HMRC changed tack by June 2014 to a "payment on account" system. The minutes of the consultative meetings included this:

> "There was one working group on withholding tax at which HMRC explained that officials were now considering a 'payment on account' system for taxpayers who were not already within
> 10 the self-assessment system, rather than a system whereby tax is withheld by a person other than the disponer. …
>
> …
>
> There was some discussion about the proposal for a 30 day window to make an initial estimate of gains and payment on
> 15 account. Some concerns raised about complex situations and time allowed for amendments where non-residents were not within self-assessment."

201. These proposals were aimed at those *not* within the self-assessment system already.

20 202. The Responses document however was different. It stressed that:

> "7.22 A different process will apply to non-residents with an established relationship with HMRC via a live self-assessment record to those that do not. However, in both cases the non-resident disposing of UK residential property will need to notify
> 25 HMRC within 30 days of the property being conveyed that the disposal has occurred. …
>
> 7.23 HMRC will need to be notified where there is a loss, or no gains on the disposal of the property, or if any gains made are covered by an individual's annual exempt amount. The
> 30 notification will also be the method by which a private residence relief (PRR) nomination is made.
>
> 7.24 Where there is an existing relationship *and the disposal is not exempt by virtue of PRR*, the person will also have to deliver their self-assessment return after the end of the tax year and
> 35 make any payment that is due within the usual self-assessment timescales in the normal way. A person may choose to make a payment on account in respect of the disposal and, if so made, this will be shown as a credit on their self-assessment statement. [My emphasis]
>
> 40 …
>
> 7.26 A person who does not have an established relationship with HMRC, as detailed above, will be required to deliver a return for the disposal within 30 days and make payment at the same time. The return will be treated as if it were the self-

> assessment return for the tax year in question, with amendments being permitted within 12 months following the normal self-assessment filing date for the tax year in which the disposal is made."

203. For the person outside SA the requirement would be to make a return within 30 days of completion and an advance payment of the tax likely payable. Such a system made sense for those who were not within the SA system – if there was more than a brief delay the chances of recovery of the tax became slimmer.

204. It made little sense for those within SA, where HMRC's ability to connect land sales with the tax records of sellers would ensure that self-assessment would be properly policed, to the extent it could be where the person concerned was non-resident. And in accordance with the principle of self-assessment there was no need to account for the tax. But a need to report a gain, no gain or a loss whether or not tax was payable under SA remained. The reference in 7.24 to a person whose gain was exempt by PRR not having to make a self-assessment is telling. It ignores of course the possibility, as in this case, that a person able to claim PRR may have nevertheless been receiving taxable rents. But it is consistent with the Guidance Notes for completing the CGT pages of the SA 100 tax return that PRR exempt gains are not reportable.

205. It does not explain why in the case of a person within SA a separate reporting of the gain is required within 30 days.

206. Given what the responses document says it would have been obvious to most people that when it comes to drafting the legislation, the return requirements would need to be separated between SA cases and non-SA cases. Had this been done then it would have been possible for those responsible for policy to give thought to the most appropriate way of constructing two penalty systems, one for non-SA cases where the return was extremely important and one for SA cases where it was to all intents and purposes superfluous.

207. A system such as that in Schedule 55 is necessary where a return is the only source of information. Where the person is not within SA it may be apposite to use Schedule 55. But it is by no means ideal. SDLT does not use it: the SDLT penalty system in paragraphs 3 to 5 Schedule 10 FA 2003 is a flat rate system akin to that for corporation tax which is also not within Schedule 55. There is a tax related penalty which, unlike that in paragraphs 5 and 6 Schedule 55, does not have a minimum of £300 even if no tax is payable.

208. And no one seems to have noticed that in relation to non-SA cases the daily penalty regime in paragraph 4 Schedule 55 is wholly unsuited to a system where there is no continuing record and no notice to file.

209. But non-SA cases are not the case here. Here, despite what was said in paragraph 7.24 of the Responses document, there was no exemption for full PRR cases from the requirement on an SA taxpayer to make the return and face penalties for non-compliance. There was some repentance in FA 2016: s 12ZBA retrospectively excused people from making a return where there was a no gain/no

loss ("NG/NL") transaction. But an NG/NL transaction is not exempt; a gain fully covered by PRR is.

210. On the face of it, HMRC policy makers seem to have sleepwalked into a position where a person whose gain is exempt or is reportable on their income tax return, and who is subject to penalties of up to £1,600 for failing to make that return on time, is also subject to penalties of up to £1,600 for not telling HMRC earlier something that will appear on their income tax return, through the unthinking approach of using Schedule 55 to apply to failure to make the NRCGT return.

211. Unfortunately I am driven to the conclusion that this may have been the intention of the policymakers. The outcome of their work was that a person in the appellant's position whose gain was nil who failed to file a NRCGT return and then who failed to file an SA return returning this nil gain in time would face a penalty of £3,200 (though eventually correctly amended to £2,500).

212. I am going to be generous to them[20] and assume that it was not their intention. I am then assuming that they would, had they realised the consequences of what they were doing, at least have followed the principles behind 7.24 of the Responses document and not charged penalties where the gain was exempt because of PRR.

213. There is some excuse for the policymaking failures. There was no Committee Stage in Finance Bill 2015 because of the election, and there had been as far as I can tell no exposure of draft clauses before the Bill was introduced. Had there been such exposure or a Committee Stage, there would have been some time for objections to be made to s 12ZB and for amendments to be tabled.

214. On that basis the penalties in the case were not in accordance with the real compliance intention and so there were special circumstances on this basis as well.

Maladministration

215. The Enquiry Manual suggests that maladministration may be a special circumstance. There is no maladministration by an individual officer of HMRC here similar to that in *Morgan*.

216. There was a lack of meaningful and sensible communication from HMRC where it could easily have been done for the small cohort of taxpayers in which the appellant fell.

217. The failure by HMRC to target the obvious body of taxpayers who might be affected compares so badly with the excellent arrangements relating to the penalties for CIS and PAYE and the introduction of RTI (Real Time Information) and the failure to arrange for the sort of "soft landing" that applied to the penalties there (RTI

[20] This is indeed generous because HMRC seem to be on the point of repeating this approach. Under the proposals for "Making Tax Digital" certain taxpayers will be required to make quarterly returns of receipts and outgoings. They will still be required to make, or make the equivalent of, income tax returns. The quarterly returns will not be used by HMRC for any compliance purposes and will not be enquired into. There is no requirement to pay anything with them as there is with VAT returns. Yet there will be penalties for failure to deliver them on time and penalties for failures to deliver the return or its equivalent on time.

penalties are still "soft" and at HMRC's discretion in individual cases) also suggests that there could be *Morgan*-type special circumstances here.

218. But I have taken this into account in coming to the decision that the appellant had a reasonable excuse.

5 ***Proportionality***

219. The Enquiry Manual also considers that s 102 TMA could be used to mitigate a wholly disproportionate outcome. The concept of proportionality in relation to direct tax failure to file penalties was considered by the Upper Tribunal in *HMRC v Anthony Bosher* [2013] UKUT 0579 (TCC). The penalty system there related to failures by 10 contractors to make returns of payments made to sub-contractors under the Construction Industry Scheme ("CIS"). Payers were required to make monthly returns including nil returns. Where a monthly return was late, a penalty of £100 per month for 12 months followed by a one off penalty of up to £3,000 was charged, so that a failure to make returns for 12 months could result in more than £15,000 15 penalties becoming due a year. Mr Bosher's penalties came to £54,100.

220. HMRC had taken a policy decision that where such penalties were imposed, they would apply s 102 TMA to reduce them to the penalty that would be charged under the forthcoming system in paragraphs 7 to 13 Schedule 55 (ie not the penalties in this case). The penalties under that system were a small fraction of the penalties 20 actually imposed, and in Mr Bosher's case came to £14,600.

221. The Upper Tribunal held that the then CIS penalty scheme was not liable to be struck down as disproportionate. But it seems that a substantial contributing factor in their decision was the power to mitigate and the fact that it had been used to make very substantial mitigation.

25 222. In this appeal had there not been a power to reduce the penalty because of special circumstances I think that the result would not just have been harsh but would have been conspicuously unfair, to quote from *International Transport Roth GmbH & Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158 at [59] per Simon Brown LJ, which is generally accepted as the test for proportionality[21].

30 223. I consider that I can reduce that unfairness by making a special reduction.

224. I am assuming that I can reduce the penalties to nil on account of the special circumstances I have found to exist. If I can't I would reduce them to 1 penny.

Decision

225. Under paragraph 22 Schedule 55 FA 2009 the penalties are cancelled because it 35 is more likely than not that there was no NRCGT disposal in 2015-16.

226. But if there was such a disposal, the paragraph 4 penalties are cancelled because the conditions in paragraph 4(1)(b) and (c) were not met

[21] The decision also uses the following adverbs to qualify "unfair": frankly, simply, truly, plainly, inherently and wholly. The tyrant Draco also gets a mention.

227. And the other penalties should be cancelled because the appellant had a reasonable excuse or, if not, the decision of HMRC as to special circumstances was flawed and I substitute my own decision that because of such circumstances the penalties are reduced to nil or if that it is not possible, 1 penny.

5 228. 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 10 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

15 **RICHARD THOMAS**
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2017

APPENDIX

Schedule 55 FA 2009

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.

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970
2A	Capital gains tax	NRCGT return under section 12ZB of TMA 1970

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

4—(1) P is liable to a penalty under this paragraph if (and only if)--

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)--

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5—(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of--

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

6—(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

…

(5) the penalty under this paragraph is the greater of--

> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

…

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.

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—

…

(c) 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.

Determination of penalty geared to tax liability where no return made

24—(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered

on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates--

> (a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and
>
> (b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).

…