



TC06557

Appeal number: TC/2017/06539

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOHN NUGENT

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 18 June 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 30 August 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 15 December 2017 and the Appellant's Reply dated 16 December 2017.

DECISION

Introduction

- 5 1. This is an appeal against penalties for the late submission of a non-resident capital gains tax (“NRCGT”) return charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2017. The penalties are as follows:-

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

The Facts

- 10 2. The facts are straightforward and are apparently not in dispute.
3. Mr Nugent is and has been resident in Jersey for all of his life apart from a short period ending in 1966. He is a 71 year old retired pensioner. He has no interest in tax matters.
- 15 4. He owned a property in St Helens in the UK which he had bought a few years ago. HMRC have it noted that he purchased it on 15 January 2013. It had been rented out since 1 June 2013. He completed annual self-assessment tax returns.
5. Since he was non-resident he knew that he would have no exposure to Capital Gains Tax in the UK.
6. He sold the property at a loss on 23 May 2016.
- 20 7. It was only when he was completing his tax return for 2016/17 that he decided to search the HMRC website for information on NRCGT. On 8 April 2017, he submitted the return within minutes of discovering that it was required.
8. On 19 April 2017, the penalties were issued and the appellant appealed on 30 April 2017. The appeal was unsuccessful and, on review, HMRC upheld the penalties
- 25 so on 30 August 2017 Mr Nugent appealed to the Tribunal.

The law

9. In relation to disposals made on or after 6 April 2015, Parliament introduced new provisions into the Taxes Management Act (“TMA”) 1970 to make non-residents

liable to file new returns, referred to as NRCGT returns. The legislation was contained in the Finance Act 2015.

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

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

12. Penalties are calculated on the following basis:-

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

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

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

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

Special circumstances

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

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

Reasonable excuse

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

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

Grounds of appeal

5 20. Not one of Mr Nugent's solicitor, estate or property agent had offered any advice about NRCGT.

21. The penalty is totally disproportionate.

22. HMRC did not make sufficient effort to tell non-resident property owners about the stricter reporting requirements. They should have had a system in place to tell all non-resident property owners about the changes since many do not employ agents.

10 23. He only realised that the law had been changed when he completed his tax return just after the end of the tax year.

24. The introduction of the changes amounted to an unexpected and unprecedented event that was outwith his control.

25. Mr Nugent has always been compliant with his tax obligations.

15 **HMRC's case**

26. HMRC contend that the return should have been filed by no later than 22 June 2016. It was filed 291 days late.

20 27. HMRC argue that there was extensive information available both before and after the change in legislation starting with announcements in December 2013 and the full filing requirement details were in the public domain since early 2015.

28. It was incumbent upon Mr Nugent to stay up to date with legislation affecting his activities in the UK and ignorance of the law cannot be a reasonable excuse. A prudent taxpayer having a proper regard for their responsibilities under the Tax Acts should have researched what was required.

25 29. Accordingly, Mr Nugent did not have a reasonable excuse for the late filing.

30. The penalties are not disproportionate.

31. The question of "special circumstances" had been considered and did not apply.

Discussion

32. The Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok v HMRC*¹ at paragraph 36, it "... has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair".

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

10 "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard".

Can ignorance of the law be a reasonable excuse?

- 15 34. The issue here is whether Mr Nugent's lack of awareness of the need to file the NRCGT return could, of itself, constitute a reasonable excuse. In other words, can ignorance of the law in the sense of ignorance of an obligation imposed by the law, constitute a reasonable excuse?

- 20 35. I do not agree with HMRC's assertion that ignorance of the law cannot be a reasonable excuse. The Upper Tribunal in *Perrin v HMRC*³ stated at paragraph 82:

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

- 30 36. The requirement to file a NRCGT return within 30 days of the disposal of a property is a simple and straightforward matter. Obviously, however, Mr Nugent did not know of the requirement until he checked the HMRC website. The information was however easily accessible. He could have checked the website or telephoned HMRC when he decided to sell the property. He did not.

- 35 37. Mr Nugent's absence from the UK and the fact that he has lived for most of his life in Jersey cannot in itself amount to a reasonable excuse. In fact, not living in the UK, and by his own admission having no interest in tax matters, should, if anything,

¹ 2012 UKUT 363 (TCC)

² 2015 UKFTT 329

³ 2018 UKUT 156 (TC)

impose a greater obligation to ensure that all necessary requirements were met timeously. A UK national selling property in, say, Singapore would be expected to ensure that s(he) complied with all relevant local legislation and to seek appropriate advice.

5 38. He chose to invest in this property in the UK and it appears that, when he decided to sell the property, he did not check what, if anything was required of him in terms of reporting the sale to HMRC. He assumed that his self-assessment return would suffice. It does for income tax but not for NRCGT.

10 39. I note the argument that none of the advisors were aware of the change in the legislation. That is unfortunate. HMRC did publicise the changes very widely in the UK.

40. However, I agree with Judge Brannan in *Hart v HMRC*⁴ at paragraph 77 where he states:

15 “As regards the solicitor, I do not think that there is any evidence that Mr Hart had engaged the solicitor to provide comprehensive tax advice in relation to the disposal of the Property. It is usual for a solicitor to advise in relation to stamp duty land tax returns, but I think it would be unusual for a conveyancing solicitor, unless explicitly instructed to do so, to advise more broadly on tax issues. On this basis, I do not think there are any grounds for concluding that Mr Hart could reasonably have been expected to receive advice from the solicitor in relation to
20 the need to file a NRCGT return”.

41. The same argument would apply to the estate and property agents. Their ignorance does not amount to a reasonable excuse. Mr Nugent did not consult a tax adviser.

25 42. I also agree with Judge Brannan in *Hart* at paragraph 73 where he agreed with Judge Mosedale that it was impractical for HMRC to attempt to communicate with every potentially affected non-resident taxpayer. They have no statutory obligation to do so.

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

35 44. Whilst I sympathise with Mr Nugent, he chose to invest in a property in the UK and he did not check his obligations in terms of the Tax Acts when he came to dispose of it. In most countries in the world, tax law changes on what can be an alarmingly regular basis. A prudent taxpayer would have checked. It was easy to check and, as Mr Nugent states, he was able to file the return within minutes after having done so.

⁴ 2018 UKFTT 207 (TC)

45. I must conclude that lack of awareness of an obligation to file a NRCGT return was not a reasonable excuse.

Special circumstances

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

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

47. I agree with Judge Mosedale in *Hesketh v HMRC*⁶ where she states at paragraph 127 that:

“In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions”.

I agree with her when she goes on to find that ignorance of the obligation to file, HMRC’s failure to draw the taxpayer’s attention to the change in the law, the fact that other people have made the same mistake and the fact that the appellant in that case had an exemplary tax compliance record, as is the case in this appeal, do not amount to special circumstances. Lastly, the fact that the change came as an unexpected shock to Mr Nugent does not amount to special circumstances.

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

49. For the avoidance of doubt, both whilst considering reasonable excuse and special circumstances, I had in mind Mr Nugent’s argument that the penalty regime was not reasonable or proportionate.

50. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality.

⁵ 1971 3 All ER 967

⁶ 2017 UKFTT 871

51. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, I have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Boshier*⁷, I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

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

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 23 JUNE 2018

⁷ 2013 UKUT 01479 (TCC)