[2018] UKFTT 398 (TC)

TC06600

Appeal number: TC/2017/04060

CAPITAL GAINS TAX – penalties – late filing of non-resident capital gains tax returns – Appellant claimed to be unaware of the time limit for submission of the return - whether reasonable excuse – no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LAUREN MURDOCH **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN

The Tribunal determined the appeal on 9 July 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 17 May 2017 (with enclosures), HMRC's Statement of Case dated 7 August 2017 (with enclosures) and the Appellant's reply dated 13 November 2017.

DECISION

Introduction

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

2. The penalties imposed were:

Penalty	**£**
Late filing penalty (Schedule 55 paragraph 3)	100
6 month late filing penalty (Schedule 55 paragraph 5)	300
12 month late filing penalty (Schedule 55 paragraph 6)	300
Total	700

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

The facts

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

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

6. On 16 June 2015 the Appellant sold UK property in respect of which a NRCGT return was required to be filed by 16 July 2015.

7. The Appellant filed the NRCGT return on 22 August 2016.

8. It appears that following the imposition of the penalties on 29 September 2016, by letter of appeal received by HMRC in December 2016, the Appellant appealed the penalties. This letter was not made available to the Tribunal.

9. On 23 December 2016 HMRC responded. By reference to this letter is appears that the Appellant's original appeal sought to contend:

> (1) At the time the property was sold the Appellant checked her online self-assessment form and clicked the link "Do you need to complete a CGT" but despite this was not aware that the time limit for submission of the NRCGT return was 30 days from the date of disposal of the property.
>
> (2) The penalties are harsh because there has been no loss to the revenue as no tax was due on the disposal.

10. The Appellant also raised issues with communicating with HMRC. Those issues are not relevant in the present appeal.

11. HMRC's response confirmed the penalties finding there to be no reasonable excuse and no basis on which to reduce the penalties by reference to special circumstances.

12. By letter dated 23 February 2017 the Appellant appeared to repeat the assertions set out in the December letter. The principal focus of this letter however, were the concerns the Appellant had that HMRC was continuing to send correspondence to an old address.

The law

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

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

(8) The 'filing date' for a NRCGT return is the 30th day following the day of the completion of the disposal to which the return relates. But see also 12ZJ(5)."

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

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

16. Paragraph 3 Schedule 55 permits HMRC to impose a £100 penalty on a taxpayer if the return is late. Paragraph 5 permits HMRC to impose a tax geared penalty of 5% of the return is 6 months late, but with a minimum penalty of £300. [Paragraph 6 permits HMRC to impose a tax geared penalty of 5% of the return is 12 months late, but with a minimum penalty of £300.]

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

18. As is noted in the judgment of the tribunal in *Raymond Hurt [2018] UKFTT 207* the reasonable excuse defence also appears to arise pursuant to s118(2) TMA. Pursuant to s118(2) the defence of reasonable excuse has the effect that the NRCGT return is deemed not to have been late (thereby removing liability to a penalty).

19. The effect of a reasonable excuse under paragraph 23 Schedule 55 discharges the penalty. However, paragraph 23 Schedule 55 is a more restrictive provision because excludes from the scope of what constitutes a reasonable excuse: (1) insufficiency of funds, unless attributable to events outside the taxpayer's control, and (2) reliance on a third party unless the taxpayer took reasonable care to avoid the failure. The difference between s118(2) and paragraph 23 could be significant in the present appeal because the Appellant's grounds of appeal makes reference to reliance on his accountants. On the basis of the Appellant's grounds of appeal there is no difference between the provisions as neither insufficiency of funds not third party reliance form the basis of the appeal.

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

Burden of proof

21. It is for HMRC to establish, on the balance of probabilities, that the Appellant is liable to a penalty. As set out in the recent Upper Tribunal judgment in the matter of *Christine Perrin [2018] UKUT 156* paragraph 69, a mere assertion of the occurrence

of the relevant events in the statement of case is not sufficient to meet that burden. Evidence is required and unless there is sufficient evidence to prove the relevant facts on the balance of probabilities the case of the penalty will not be made out.

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

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

24. The role of the Tribunal (as set out in *Perrin*) is a "value judgment" [70] taking account of "all relevant circumstances; because the issue is whether the particular taxpayer had a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account as well as the situation in which that taxpayer was at the relevant time or times." [71]

Grounds of appeal

25. By her notice of appeal the Appellant contends:

> "I feel that the penalties should be cancelled. There was no loss of revenue to the Government and no deliberate avoidance on my part to complete the return within 30 Days.
>
> I believe this has been an issue in regards to individuals and professionals receiving or finding this new legislation and in these circumstances I believe the penalties are harsh".

26. By email to the Tribunal dated 13 November 2017 the Appellant raised the following points:

> (1) She was aware that she had to complete a CGT when selling her rental property as she had checked her online tax return
>
> (2) She did not appreciate that a NRCGT return was required within 30 days and due to limited internet capacity did not check more widely than her self-assessment online account
>
> (3) She had become aware that there were cases proceeding to tribunal and that 2 cases had successfully appealed the imposition of the penalties.
>
> (4) She reiterates that she was genuinely unaware that she was non-compliant and that she had been a compliant tax payer regarding her property income both as a UK resistant and non-UK resident taxpayer.

HMRC's case

27. HMRC contend that the Appellant should have submitted the NRCGT return within 30 days of the disposal of the Property. In this case, the return was submitted on 22 August 2016 and was, therefore, late by 402 days.

28. HMRC asserted that the new legislation relating to the taxation of non-residents in respect of capital gains arising on UK property was announced in December 2013 and details regarding filing requirements were published on the internet on 6 April 2015 – 71 days before the disposal of the property.

29. It was HMRC's submission that the Appellant had an obligation to stay up-to-date with legislation affecting his activities in the UK and that they would have expected the Appellant, acting as a prudent person, to have researched what was expected regarding his tax obligations. HMRC could see no reason why the Appellant could not, from his non-UK place of residence, have established the requirements on him by reference to the material published on their website.

30. HMRC considered it unrealistic that they be required to contact every non-resident individual with UK property interests of the change and publication on their website was sufficient. In HMRC's submission it is a taxpayer's statutory duty to make themselves familiar with the requirements and comply with them.

31. HMRC do not consider that the Appellant has a reasonable excuse for the late filing of the NRCGT return. Further they consider no special circumstances apply justifying a reduction in the penalty imposed.

Reasonable excuse where ignorance associated with the requirement to file is asserted?

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

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

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

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

A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.

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

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

36. There are conflicting judgments on whether ignorance of the introduction of section 12ZB TMA can, or in any particular circumstance does, constitute a reasonable excuse.

37. In the cases of *McGreevy [2017] UKFTT 690* and *Saunders [2017] UKFTT 765* the Tribunal held that the taxpayer's ignorance of the newly introduced regime could amount to a reasonable excuse. The rationale for the conclusion in those judgments was that the maxim that "ignorance of the law is no excuse" was limited to application in the context of criminal, as distinct from civil, law. In the judgments of *Welland v HMRC [2017] UKFTT 870* and *Hesketh v HMRC [2017] UKFTT 871* the

tribunal disagreed with the position taken in *McGreevy* and *Saunders*. In the more recent case of *Hart* the tribunal approved the approach taken in *Hesketh* and *Welland*.

38. The judge in *Hart* takes the position that whilst *McGreevy* and *Saunders* were incorrect to determine that ignorance of the law applied only in criminal law there may be circumstances in which ignorance will represent a reasonable excuse. Reference is made, paragraph [61] to the judgment in *Neal v Commissioners of Customs & Excise [1988] STC 131* in which it was determined that ignorance of the law can, in certain circumstances, represent a reasonable excuse particularly where there is a complex legislative or uncertain area of law and as such will arise comparatively rarely. Agreeing with the judge in *Welland* and *Hesketh* the tribunal notes:

> "[64] … Much of the UK's extraordinarily voluminous tax code is complex but, as Judge Mosdale observed, it is evidently Parliament's intention that it should be complied with. I can see some justification for an exception to the general principle concerning ignorance of the law in cases concerning difficult questions. That is particularly the case in respect of issues involving evaluative decisions concerning mixed fact and law such as the difference between employment and self-employment status or, perhaps, between trading and investment activities – decisions which can often be finely balanced. Nonetheless, the decision gives rise, in my respectful view, to intractable questions concerning how difficult must an area of law actually be (and what test must be applied) before a taxpayer can claim his or her failure to understand the legal obligations imposed by the law can constitute a reasonable excuse. That said I not think it desirable or sensible to try to lay down sweeping general principles in an area where so much will depend on the facts and circumstances of the particular case."

39. The tribunal concluded:

> "[72] The obligation to submit a return was not, in my view, particularly complex and as soon as Mr Hart and his advisers realised that a return should have been made it was submitted without particular difficulty. To paraphrase the language of Simon Brown J in *Neal*, Mr Hart was unaware of the basic law requiring him to make a return. This was not a case where a balanced evaluative decision concerning a number of different factors was required to be made nor was it, in my view, a particularly complex area of law on which different views could validly be held.
>
> [73] Furthermore, there is no suggestion that the text of the law was not accessible. I do not accept the submission made on behalf [sic] Mr Hart that the obligation to file a NRCGT was not sufficiently publicised. It was publically announced and advertised online. I agree with Judge Mosdale who considered it was impractical for HMRC to attempt to communicate individually with every potentially affected non-resident taxpayer."

40. Were that where the case law rested this Tribunal would face conflicting judgments none of which are binding. However, outside the direct context of NRCGT returns the Upper Tribunal, in *Perrin*, has recently reconsidered the circumstances in which a reasonable excuse is established and in respect of which comments on a failure to understand the statutory requirements has arisen.

41. The facts of *Perrin* concerned a failure to file self-assessment tax returns. Mrs Perrin had completed her return online she had gone through the online process as far as receiving a "submission receipt" and the associated reference number; however, certainly at the time, there was one further step to be undertaken before the return was filed. Mrs Perrin had not taken that final step (an error she had also made the prior year).

42. In a comprehensive judgment the Upper Tribunal considers the case law on reasonable excuse picking up what appears to represent a current thread of attack in reasonable excuses drawing an analogy with criminal law vis a vis the honest belief of the taxpayer.

43. As is evident on the facts *Perrin* concerned whether Mrs Perrin genuinely and honestly considered that she had submitted her return. At paragraphs [72] – [74] the Upper Tribunal confirms that the First-tier Tribunal must review the evidence and establish, by reference to such evidence, what the taxpayers state of mind is; in Mrs Perrin's case did she honestly and genuinely believe by reference to the evidence, that she had submitted the return? In doing so the Upper Tribunal notes "the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is asserted was in fact held" [72].

44. As set out at paragraph [73]: "once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively."

45. As to that objective judgment the Upper Tribunal states:

> "Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return" … In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact is not on its own enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer which was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade the tribunal he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

46. The Upper Tribunal then provides a clear framework for First-tier Tribunal judges to follow when considering reasonable excuse:

> "[81] When considering a "reasonable excuse" defence therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of these facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times".

47. On the question of ignorance of law the Upper Tribunal states:

> "[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 straight forward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question and for how long. *The Clean Car Co* itself provides an example of such a situation."
>
> "[83] It is regrettably still the case that HMRC sometimes continue to argue that the law requires any reasonable excuse to be based on some "unforeseeable or

inescapable" event, echoing the dissenting remarks of Scott LJ in *Commissioners of Customs and Excise v Steptoe [1992] STC 757*. It is quite clear that the concept of "reasonable excuse" is far wider than those remarks implied might be the case. In an appropriate case where HMRC base their argument on this unsustainable position, the FTT may well consider it appropriate to exercise their jurisdiction to award costs against HMRC for unreasonable conduct of the appeal. Similar observations apply to the HMRC "mantra" referred to at [109] of the 2014 Decision, to the effect that an "unexpected or unusual event" is required before there can be a reasonable excuse. The statutory phrase is "reasonable excuse", and those are the words that are applied by HMRC and the FTT, interpreted as set out above: the addition or substitution of other words beyond these used in the statute can very easily obscure rather than clarify the value judgment as to whether or not a taxpayer has a reasonable excuse, and should be avoided."

Discussion

48. There is scant evidence in this case, such evidence being limited only to a single letter and an email from the Appellant.

49. From these documents it appears to the Tribunal that the Appellant was aware of the requirement to declare the sale of the property for CGT purposes but believed that such declaration would be via her online self-assessment tax return which, for the tax year in the sale took place would have been required to have been filed (assuming an online submission) by 31 January 2017.

50. It is implicit from the papers that the NRCGT return was completed but it is not clear if submission coincided with completion of the Appellant's online self-assessment tax return or separate from it.

51. The Tribunal also had no means of corroborating how, if at all, the online self-assessment return references the NRCGT return. HMRC guidance, first issued on 6 April 2015, entitled "Capital Gains Tax for non-residents: UK residential property" provides that the requirement to pay any CGT on the disposal can be deferred where the taxpayer has an existing relationship with HMRC through self-assessment in which case payment can be deferred until the taxpayers normal payment date.

52. The guidance itself, which the Appellant states she was not aware of, does clearly state that the NRCGT return must be submitted within 30 days of the conveyance and that penalties apply if the disposal is not reported within that time frame.

53. Due to the absence of evidence in this case the Tribunal finds itself unable to conclude what the online self-assessment process would inform a taxpayer such as the Appellant. The Appellant says it did not tell her about the 30 day filing requirement. It strikes the Tribunal that it is conceivable if not likely that the online self-assessment process may not provide the time limit as the obligation to file is separate from the

online annual self-assessment process. HMRC are silent in their statement of case on the issue.

54. However, even if the Tribunal is prepared to accept that the Appellant was genuinely and honestly unaware of the obligation to file the NRCGT return within 30 days would that constitute a reasonable excuse. In order to do so the Tribunal must, objectively determine by reference to the specific attributes of the Appellant if it was reasonable for her to hold that belief. Relevant to this aspect of the analysis will be to take account of the fact that it is implicit from the papers that the Appellant owned the property as an investment property deriving income from it over a period of time prior to sale (she is clear that she was a compliant taxpayer regarding her rental income property when resident and subsequently non-resident) and someone reasonably familiar with the tax system. Someone sufficiently astute as to check the online self-assessment return.

55. Had there been more evidence as to the precise information available through the online self-assessment return the Tribunal might have been in a position to conclude that checking the self-assessment return was sufficient but absent the information and in the wider context of the Appellant's aptitude and awareness of the tax regime the Tribunal considers that the Appellant has failed to meet the burden of proof required to establish a reasonable excuse based on the lack of awareness of the time limit.

56. This is not ameliorated by the Appellant's claim to have limited internet connection as she was able to check her self-assessment account and has subsequently established that others have been successful in their appeals and thus must call into question the voracity of the claim to have limited connectivity.

57. The Appellant has also flagged that there should be no penalty because there is no tax loss to HMRC. Whilst neither paragraph 23 Schedule 55 nor s118 exclude the possibility of a reasonable excuse by reference to there being no tax loss it is clear from the case law regarding other late filing penalties that the objective of the penalty is to ensure compliance, the fact that no additional tax is due would significantly impede the purpose of the penalties and the Tribunal confirms that no reasonable excuse can thereby be established.

58. The Appellant has also raised the issue that the penalties charged are harsh though does not argue the point further. Similar arguments have been raised by taxpayers in connection with other late filing penalties. 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 harsh or 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". Special circumstances are considered below. On the basis of the case law concerning those other penalties the Tribunal does not consider that it has a separate power to consider the proportionality or otherwise of the penalties.

Special Circumstances

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

60. The same factors as were sought to justify a reasonable excuse were considered in the context of special circumstances and HMRC concluded that no special circumstances arose.

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

62. The Tribunal takes the view that it is clear that HMRC have considered special circumstances in a proper fashion with which the Tribunal may not interfere.

Decision

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

64. Accordingly the appeal is dismissed.

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

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 16 JULY 2018