



TC06611

Appeal number: TC/2017/05432

CAPITAL GAINS TAX – penalties – late filing of non-resident capital gains tax returns – whether special circumstances arise – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK CHAPMAN

Appellant

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN

The Tribunal determined the appeal on 13 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 29 June 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 11 September 2017.

DECISION

Introduction

5 1. This case concerns an appeal by Mark Chapman (“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
Total	400

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3. According to HMRC’s statement of case, HMRC had also charged £900 in 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.

15 **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.

20 5. At the time relevant to the appeal, and as far as the Tribunal is aware currently, the Appellant is not resident in the UK as a consequence of working obligations overseas.

6. On 9 March 2016 the Appellant sold UK property in respect of which a NRCGT return was required to be filed by 8 April 2016.

7. The Appellant filed the NRCGT return on 14 October 2016.

25 8. As a consequence of the late submission of the NRCGT return, on 30 November 2016 HMRC issues the late filing penalties now under appeal.

9. By letter dated 7 December 2016 the Appellant appealed the imposition of the penalties claiming that the error was accidental. The Appellant stated that he was not

an overseas investor or trader and the property which had been disposed of was his late mother's house. He indicated that as soon as he became aware of the error he appointed an accountancy firm to deal with the submission of the return. He also contended that in light of the fact that the tax on the disposal was only £687.06 he felt the penalty was disproportionate and excessive.

10. On 10 March 2017 HMRC rejected the Appellant's appeal asserting that in order for a reasonable excuse to be established the Appellant must satisfy them that the failure to render the return arose from unexpected or unusual events which were either unforeseeable or beyond the Appellant's control.

11. A review was requested on 31 March 2017. The basis for review was stated to be: "1) The gain should be treated as no gain no loss on the grounds it would be inequitable to penalise me so harshly for so small a gain, and the penalty is disproportionate to the tax payable. 2) This was a new regulation that was not publicised overseas, it was an unusual event (once in my life) that was not foreseeable by me."

12. HMRC upheld their original decision by letter dated 5 May 2017. Addressing the issues raised by the Appellant they contended:

(1) The reporting requirements for a NRCGT return are not dependent upon there being a charge to tax therefore the underlying tax treatment of the disposal was not relevant and could not constitute a reasonable excuse.

(2) The penalty sums are fixed by statute and encourage compliance, they are not therefore disproportionate.

(3) The new legislation was appropriately announced and publicised.

The review letter also considered special circumstances and concluded that none of the matters raised constituted a special circumstance justifying a reduction in the penalty.

13. The Appellant notified his appeal to the Tribunal on 5 June 2017.

The law

14. 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)."

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

15 16. 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.

20 17. 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.]

25 18. 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.

30 19. At paragraph 16 Schedule 55 FA 2009 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

35 20. 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.

21. 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.

5 22. 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 HMRC's decision on special circumstances was flawed and, if so, that the Tribunal should reduce the penalties.

Grounds of appeal

10 23. By his notice of appeal the Appellant limits his appeal to one concerning special circumstances:

“HMRC rules state that a penalty may be reduced if there are special circumstances. Special circumstances mean circumstances that are uncommon or exceptional.

15 (1) The NRCGT has arisen due to the disposal of my late mother's [sic] house (the former family home). This is a once in a lifetime event and I would contest this is certainly “uncommon or exceptional”.

20 (2) At the time of disposal of the property, I was working overseas and this was a new piece of legislation, exceptional in the tax year 2015/16 as it had never applied before. In any event I do not believe that it was reasonable to impose a late penalty as this was not well publicised by HMRC at the time the directive was aimed at (i.e. non UK residents).”

HMRC's case

25 24. 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 30 November 2016 and was, therefore, late by 190 days.

30 25. 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.

35 26. 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.

27. 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.

28. HMRC do not consider that no special circumstances apply justifying a reduction in the penalty imposed.

5 Ignorance of law

29. It is important when considering a claim that special circumstances are made out justifying a reduction in a penalty that the majority of taxpayers do file returns on time and are entitled to expect that compliance will be enforced. Special circumstances should therefore justify the relevant inaction by a non-compliant taxpayer such that it is just that such non-compliance should lead to a reduction in the penalty.

30. Most of the case law considers the question of reasonable excuse and goes on to consider special circumstances. The case law on reasonable excuse in the context of ignorance of the law in the context of NRCGT is not consistent but following the recent Upper Tribunal judgment in *Christine Perry* there is greater clarity on the approach to be adopted. The Tribunal considers it appropriate to take account of that case law when considering special circumstances.

31. In a recent judgment of the FTT in *Raymond Hart [2018] UKFTT 207* the approach of the Tribunal in connection with ignorance of a taxpayers obligations in the context of a reasonable excuse appeal was to conclude that ignorance of law was not an impermissible basis on which to establish a reasonable excuse but that to do so the nature and complexity of the legal obligations was relevant:

“[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.”

32. 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.”

33. That approach has been essentially endorsed by the Upper Tribunal in *Perrin*. 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).

“[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.”

Special Circumstances

34. 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 determine the nature and extent of the reduction applicable for special circumstances but they may nevertheless uphold the conclusion if, on the evidence, the outcome was inevitable.

35. Case law going back to *Clarks of Hove v Bakers' Union* [1978] 1 WLR 1207 held (at page 1216) that in the context of “special circumstances” the word ‘special’

means “something out of the ordinary, something uncommon. In *Crabtree v Hinchcliffe* [1971] 3 All ER 967 (at page 976) that “‘special’ must mean unusual or uncommon – perhaps the nearest word to it in this context is ‘abnormal.’” In the same case, Viscount Dilhorne said (at page 983) that “for circumstances to be special they must be exceptional, abnormal or unusual...” The tribunal has generally accepted that these meanings apply to the same term used in paragraph 16 Schedule 55.

36. The matters raised by the Appellant are that this disposal was a one off event in the context of a new reporting regime.

37. The approach of HMRC was to consider these factors in the context of the relevant test. They considered them when first raised and in the context of the appeal. The Tribunal can see no flaw in the approach adopted by HMRC.

38. In any event it is the Tribunal’s view that a lack of awareness could potentially constitute a special circumstance but is rarely likely to need to be considered as such because of the availability of a reasonable excuse which would entirely discharge the penalty. However, as set out above a lack of awareness of administrative tax matters cannot be considered to be abnormal. Similarly, there are many individuals who find themselves in a position of having to dispose of a property after the death of a family member. Neither could be considered to be unusual or uncommon.

Decision

39. 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 special circumstances justifying a reduction.

40. Accordingly the appeal is dismissed.

41. 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: 23 JULY 2018