



**TC06653**

**Appeal numbers: TC/2017/04624 and TC/2017/04626**

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

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GILLIAN M W IKIN and  
ROBERT J IKIN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT**

**The Tribunal determined the appeal on 16 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 Notices of Appeal dated 1 June 2017 (with enclosures), and HMRC's Statements of Case (with enclosures) acknowledged by the Tribunal on dated 22 August 2017.**

## DECISION

### Preliminary Matter

1. On 30 June 2017 the Tribunal directed that these two appeals proceed together and be heard by the same Tribunal.

### Introduction

2. The appellants appeal against penalties for the late submission of non-resident capital gains tax (“NRCGT”) returns charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2016 and 5 April 2017. The penalties for each of them are as follows:-

*2015/16*

<b>Penalty</b>	<b>£</b>
Late filing penalty (Schedule 55, paragraph 3)	100
6 months late filing penalty (Schedule 55, paragraph 5)	300
12 months late filing penalty (Schedule 55, paragraph 6)	300
<b>Total</b>	<b>700</b>

*2016/17*

3. There is a late filing penalty for each of them of £100 imposed under paragraph 3 Schedule 55.
4. In the first instance HMRC had also issued both appellants with daily penalties in the sum of £900 but those have now been withdrawn.
5. In respect of Mr Ikin the 2015/16 penalties were imposed on 9 December 2016 and the 2016/17 penalty on 18 December 2016. In respect of Mrs Ikin the 2015/16 penalties were imposed on 17 January 2017 and the 2016/17 penalty on 17 January 2017.

### The law

6. In relation to disposals made on or after 6 April 2015, Parliament introduced new sections into the Taxes Management Act to make non-residents liable to file new returns, referred to as NRCGT returns. The legislation was contained in the Finance Act 2015.

7. With effect from 26 March 2015, a NRCGT return under Section 12ZB TMA was added to Schedule 55 by section 37 and paragraph 59 of Schedule 7 of the Finance Act 2015. 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.

5 8. 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).

9. Penalties are calculated on the following basis:-

(a) Failure to file on time (ie the late filing penalty) - £100 (paragraph 3);

10 (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); and

(c) Failure to file for 12 months (ie the 12 month penalty) – 5% of payment due or £300 (whichever is the greater) (paragraph 6).

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

15 11. 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).

12. 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 13. 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 inability to pay (paragraph 16).

25 14. 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 15. 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 16. 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)).

## The Facts

17. The appellants are married and did not live in the United Kingdom at the point of disposal of the properties.
18. In the year ending 5 April 2016 the appellants disposed of a property in the United Kingdom and HMRC accept that the date of disposal for NRCGT purposes was 10 August 2015. There is no tax payable.
19. The NRCGT return should have been filed by 9 September 2015 but Mr Ikin's return was filed on 3 November 2016 and Mrs Ikin's return on 14 December 2016.
20. In respect of the year ending 5 April 2017, the appellants disposed of another property in the UK and HMRC accept that the date of disposal was 8 September 2016. There is no tax payable.
21. The NRCGT return should have been filed by 8 October 2016 but Mr Ikin's return was filed on 15 November 2016 and Mrs Ikin's return on 16 December 2016.
22. The reason for the different filing dates was that the properties were jointly owned and it had not been understood that both parties had to report the sale.
23. The penalties were imposed on the dates set out in paragraph 5 above. The appellants both wrote appealing the penalties and requesting a review but HMRC upheld the penalties.
24. The appellants explained that Mr Ikin deals with the appellants' joint tax affairs and, at the point of disposal of these properties, he was negotiating his retirement from his long term employer in difficult circumstances.
25. He concedes that he was aware that the law had changed but states that he did not know the detail and, in particular, was not aware of the requirement to file returns within 30 days of the sale.
26. Mr Ikin only became aware of the obligation to report the sales when he started to prepare his tax return for 2015/16 which was not due until 31 January 2017. He had intended to report the first sale in that return. He was aware that there was no CGT payable on the sale of the property and thought that there was no urgency until the tax return had to be submitted. He states that as soon as he became aware of the position he filed the returns.
27. Both appellants indicated that they thought that the penalties were disproportionate and it was unreasonable to be penalised separately for a single event as they owned the properties jointly. They had no intention of failing to comply and acted immediately on discovering the requirement. They were retired and there would be a hardship element in imposing heavy fines. They had also noted that on the introduction of the changes in the legislation HMRC had adopted a more lenient stance but their sales fell outwith that period. They asked for that concession to be extended to them.

## Discussion

28. The Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok v HMRC*<sup>1</sup> at paragraph 36, it "... has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair". Accordingly, I cannot take into  
5 account their arguments that the penalties are unfair and discriminatory.

29. 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*<sup>2</sup> 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".

15 *Can ignorance of the law be a reasonable excuse?*

30. The issue here is whether the appellants 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 31. I do not agree with HMRC's unequivocal assertion that ignorance of the law cannot be a reasonable excuse. The Upper Tribunal in *Perrin v HMRC*<sup>3</sup> 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  
30 for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

35 32. The requirement to file a NRCGT return within 30 days of the disposal of a property is a simple and straightforward matter. Obviously, however, although the appellants did know that they should inform HMRC about the sale, the appellants did not know of the timing requirement. The information was however easily accessible. The appellants could have checked the HMRC website or telephoned HMRC when they decided to sell the properties. They did not.

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<sup>1</sup> 2012 UKUT 363 (TCC)

<sup>2</sup> 2015 UKFTT 329

<sup>3</sup> 2018 UKUT 156 (TC)

33. The appellants' absence from the UK cannot in itself amount to a reasonable excuse. In fact, not living in the UK should, if anything, 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.

34. The fact that there was no tax due 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. Whilst I sympathise with the appellants, they chose to invest in a property in the UK and they did not check their obligations in terms of the Tax Acts when they 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 the appellants state, they were able to file the returns very shortly after having done so.

36. Lastly, the appellants' personal financial circumstances can have no bearing on the imposition or otherwise of a statutory penalty. In any event, as I indicate at paragraph 16 above not even an insufficiency of funds can amount to a reasonable excuse.

37. I conclude that lack of awareness of an obligation to file a NRCGT return in these circumstances was not a reasonable excuse.

#### *Special circumstances*

38. 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)*<sup>4</sup> said:

"Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

39. I agree with Judge Mosedale in *Hesketh v HMRC*<sup>5</sup> 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

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<sup>4</sup> 1971 3 All ER 967

<sup>5</sup> 2017 UKFTT 871

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 the appellants does not amount to special circumstances.

5 40. 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  
10 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.

15 41. For the avoidance of doubt, both whilst considering reasonable excuse and special circumstances, I had in mind their argument that the penalty regime was not reasonable or proportionate.

42. 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.

20 43. 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  
25 question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Boshier*<sup>6</sup>, I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

30 44. Lastly, as I indicate above I cannot consider whether the penalties are fair. The fact that the properties were jointly owned cannot mean that only one appellant bears the penalties. The law is very clear. Each individual taxpayer has the obligation to file a return on the disposal of a property; the link is to the taxpayer not the property.

45. For all these reasons the appeals are dismissed and the penalties are confirmed.

35 46. 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

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<sup>6</sup> 2013 UKUT 01479 (TCC)

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

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**ANNE SCOTT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 13 August 2018**