



TC06780

Appeal number: TC/2017/06689

CAPITAL GAINS TAX – penalties - late filing of non-resident capital gains tax returns – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID IRONSIDE

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 6 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 6 September 2017 (with enclosures) and HMRC's Statement of Case (with enclosures)] acknowledged by the Tribunal on 12 December 2017 and the Appellant's Reply dated 4 January 2018.

DECISION

1. The appellant, Mr Ironside, appeals against penalties for the late submission of a non-resident capital gains tax return (“NRCGT return”) charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2016.
2. The penalties are as follows:
 - (1) A late filing penalty of £100, imposed under paragraph 3, Schedule 55;
 - (2) A six-month late filing penalty of £300, imposed under paragraph 5, Schedule 55;
 - (3) A twelve-month late filing penalty of £300, imposed under paragraph 6, Schedule 55.

Facts

3. The facts are straightforward and do not appear to be in dispute:
 - (1) The appellant was resident in Germany during the relevant period and had been so relevant for many years. He sold a property in the UK on 27 November 2015.
 - (2) In accordance with section 12 ZB TMA 1970, the NRCGT return was required to have been filed no later than 27 December 2015.
 - (3) The NRCGT return was filed on 6 January 2017 and so was submitted more than a year late.
 - (4) Consequently, the penalty determinations set out above were issued to Mr Marshall.

Relevant law

4. The requirement to make NRCGT returns was introduced into the Taxes Management Act 1970 (‘TMA’) by the Finance Act 2015.
5. 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, 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.
6. 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).
7. Penalties are calculated on the following basis:-
 - (1) Failure to file on time (ie the late filing penalty) - £100 (paragraph 3);

(2) 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

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

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

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

10. The legislation provides that a taxpayer may be relieved from penalties if he or she can show that there was a “reasonable excuse” for the default (paragraph 23). An insufficiency of funds, or reliance on another person, are prohibited by the same paragraph from being a reasonable excuse. In addition, where a person has a reasonable
15 excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse only if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

11. 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
20 to pay (paragraph 16). 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)).

Appellant’s case

25 12. The appellant’s case can be summarised as follows:

(1) The appellant has been resident in Germany for many years and is not exposed to UK news or press, let alone tax regulations on a daily basis. Accordingly, he did not know about the new 30 day reporting obligation in respect of the property disposal. Nevertheless, it was not disputed that it is the
30 individual’s responsibility to keep up to take with the tax implications of disposing of a property in the UK.

(2) The appellant engaged a UK solicitor to arrange the conveyancing of the property. That solicitor did not offer any advice or mention the requirement to file a NRCGT return. It was not reasonable to expect the appellant to know of his
35 reporting obligations when a professional adviser acting at the time did not appear to have any knowledge of them. Further, the appellant was entitled to rely on their professional adviser and it would be unreasonable to expect an individual to understand the detailed workings of the UK tax system. However, it was also argued that it was not reasonable for a solicitor to be aware of the reporting
40 obligations in the early days of the legislation. Whilst a tax adviser or an

accountant might have known of the obligation, they would not generally consulted within 30 days of a property disposal.

5 (3) The appellant had filed self-assessment returns for some years and it was logical for him to assume that reporting the property disposal on a self-assessment return would have been sufficient to satisfy his tax obligations. The gain on the disposal was well within his annual CGT exemption and therefore not liable to UK tax.

(4) The penalties are unfair and disproportionate to the alleged infringement as there was no CGT due on the disposal.

10 (5) HMRC cannot expect compliance with reporting obligations if the taxpayer population to which it is targeted do not know of the reporting obligation. A period of grace should have been operated before any penalties were charged.

(6) The appellant contended that, in the alternative, special circumstances applied and the penalty should be reduced accordingly.

15 **HMRC's case**

13. HMRC's case is, in summary, that:

20 (1) The return should have been filed by 6 February 2016. They submitted that there was extensive information publicly available both before and after the change in legislation and the appellant had an obligation to stay up to date with legislation affecting their activities in the United Kingdom. It is not reasonable to expect HMRC to individually contact every non-resident who files a self-assessment return to make them aware of the regime.

25 (2) HMRC does not believe that a lack of awareness of the law is a reasonable excuse. HMRC would expect a prudent person, exercising reasonable foresight and due diligence, with a proper regard to their responsibilities under tax law, to have researched what was expected regarding their tax obligations.

30 (3) HMRC would not expect someone residing outside the UK to keep up to date daily with UK tax legislation but would expect that a diligent taxpayer intending to comply with their tax obligations would, on disposing of a property in another country, ask the tax authorities of that country what the tax obligations are, rather than making an assumption.

35 (4) HMRC would not expect a conveyancing solicitor to provide tax advice but would expect a taxpayer to seek tax advice from a tax adviser or from HMRC. Paragraph 23(2)(b) of Schedule 55 specifically precludes reliance on a third party from being a reasonable excuse unless the appellant took reasonable care to avoid the failure. The fact that the solicitor did not fulfil the appellant's expectations did not amount to a reasonable excuse.

40 (5) The penalties are an administrative means of securing the production of timely returns, to encourage compliance. They are intended as a measure of fairness to ensure that customers who file late obtain no advantage over those who file on time. HMRC submitted that the penalties are not disproportionate and the penalty regime is proportionate in its aims.

14. HMRC had considered whether there were any special circumstances in this case and concluded that there were none which were uncommon or exceptional that would allow the penalty to be reduced.

Discussion

5 *Fairness of the regime*

15. Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok* (§36), the First Tier Tribunal "... has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair". Although *Hok* was concerned with VAT rather than NRCGT, it is clear that the principle applies to all penalties and so I consider that I have no jurisdiction to consider the appellant's contentions that the penalties are unfair or that it was not fair of HMRC to apply a period of grace on introducing the regime.

Reasonable excuse

16. There is no statutory definition of "reasonable excuse" but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

20 "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

17. The issue here is whether the appellant'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?

25 18. There has been a divergence of view in cases before this Tribunal. In two cases, *McGreevy* [2017] UKFTT 690 (TC) and *Saunders* [2017] UKFTT 765 (TC) the Tribunal held that that lack of awareness did amount to a reasonable excuse.

30 19. Judge Mosedale, in both *Welland* [2017] UKFTT 870 (TC) and *Hesketh* [2017] UKFTT 871 (TC) and Judge Brannan in *Hart* [2018] UKFTT 207 (TC) disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

20. These are all decisions of the First-tier Tribunal and therefore none of them are binding upon me. The Upper Tribunal, whose decisions are binding upon me, considered in *Perrin* [2018] UKUT 156 (TC) that "it will be a matter of judgement for the [First Tier Tribunal] 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".

21. The appellant has been resident outside the UK for many years, and states that he did not know about the 30 day reporting obligations. It was submitted that it was unreasonable to expect an individual to understand the detailed workings of the UK tax

5 system. However, the appellant also accepted that it is his responsibility to keep up to date with the legislation and the tax implications of disposing of a property. The appellant did not provide any specific information to indicate that he had in fact kept up to date with the UK legislation, nor were any specific difficulties with the relevant tax law detailed.

22. It was submitted for the appellant that it was logical for him to assume that the gain should be reported on his self-assessment return. It was also submitted that, as the conveyancing solicitor did not know of the reporting obligation, it was reasonable that the appellant also did not know of it.

10 23. I consider that a taxpayer in the position of the appellant, with a responsible attitude to their duties as a taxpayer, having been outside the UK for many years would have been aware that their knowledge of tax law was not up to date and would have made enquiries as to the UK tax requirements on sale of the property and made sure that these were followed, rather than making assumptions as to the reporting process.

15 24. The appellant does not indicate that any steps were taken to establish the relevant UK tax position and so I must conclude that the appellant did not take any such steps and therefore, I find, does not have a reasonable excuse for the failure to file the return on time as a result of his lack of knowledge of UK tax law. The fact that the conveyancing solicitor did not know of the reporting obligations does not, I consider,
20 give the appellant a reasonable excuse for their lack of knowledge and consequent failure to comply with reporting requirements.

Reliance on solicitor

25 25. The appellant states that he relied upon his conveyancing solicitor to tell him about the reporting obligations but also states that that it would not be reasonable expect a non-tax adviser to be aware of the regime at such an early stage in its introduction.

26. It is clear from the legislation that reliance on a third party does not amount to a reasonable excuse; however, it may be that case that where the appellant takes reasonable care to avoid the failure that a reasonable excuse can be established. As the appellant appears to have relied upon his solicitor without taking any other advice or
30 taking any steps to confirm that a conveyancing solicitor was able to advise on the UK tax implications of a property disposal by a non-UK resident, I find that the appellant cannot be regarded as having reasonable care to avoid the failure.

Proportionality

35 27. The appellant has argued that the penalties charged are disproportionate. 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 only where there are "special circumstances" and, elsewhere in this decision, I have considered the question of "special circumstances".

28. Therefore, for reasons similar to those set out in *HMRC v Boshier*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

29. *Special circumstances*

5 30. Finally, I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal’s jurisdiction in this context is limited to circumstances where it considers HMRC’s decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a
10 special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. The appellant submits that special circumstances should apply but does not set out what those circumstances might be.

15 31. Case law has determined that, to be a special circumstance, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves, and must be “something out of the ordinary, something uncommon [or] exceptional, abnormal or unusual” and normally something external to the person doing the action in question, in contrast to something within his control.

20 32. Applying the judicial review standards, I can find no reason to overturn HMRC’s decision.

Conclusion

33. The appeal is dismissed and the penalty confirmed in full.

25 34. 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.

30

**ANNE FAIRPO
TRIBUNAL JUDGE**

35

RELEASE DATE: 22 October 2018