[2018] UKFTT 0207 (TC)

TC06446

Appeal number: TC/2017/05551

CAPITAL GAINS TAX – penalties - late filing of non-resident capital gains tax returns – whether reasonable excuse – whether ignorance of law an excuse – no – whether failure by tax adviser to alert taxpayer of need to make return an excuse – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAYMOND HART **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 4 April 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 3 July 2017, HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 2 November 2017 and the Appellant's Reply dated 16 November 2017 (with enclosures).

DECISION

Introduction

1. The appellant, Mr Hart, appeals against penalties for the late submission of a non-resident capital gains tax return ("NRCGT return") charged under Schedule 55 Finance Act 2009 for the tax year ended 5 April 2016.

2. The penalties are as follows:

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, HMRC also charged £900 of daily penalties to Mr Hart. However, "following representations from a number of customers and agents", HMRC no longer issues daily penalties and those charged to Mr Hart have been cancelled.

The facts

4. The following description of the facts is taken from the respective Statements of Case prepared by Mr Hart's representatives and by HMRC and the documents attached thereto. The facts are relatively simple and, as far as I could determine from the papers, were not in dispute.

5. Mr Hart resides in Australia and did so at times material to this appeal.

6. On 28 August 2015 he sold a flat in Ascot, Berkshire ("the Property") – contracts were exchanged and the sale completed on the same date. Mr Hart engaged a solicitor to handle the conveyancing transaction.

7. No liability to UK capital gains tax arose ("CGT") either because Mr Hart claimed that the Property was his principal private residence and therefore was

eligible for relief from CGT or because of lettings relief, although I do not have full details on this point.

8. In accordance with section 12 ZB TMA 1970, the NRCGT return was required to have been filed no later than 27 September 2015. In fact, the NRCGT return was filed on 17 November 2016 and an amended return was filed on 18 November 2016. The NRCGT return was submitted late by 418 days.

9. Consequently, the penalty determinations set out at [2] above were issued to Mr Hart.

10. On 18 August 2015, prior to the disposal of the Property on 28 August 2015, Mr Hart sent an email to his UK tax advisers, a firm of accountants in Central London who regularly dealt with his tax affairs. The final paragraph of the email stated:

> " FYI – on a personal note we are selling our UK property and there may be a small Capital gain – can this be offset [sic] revenue losses on the rental house that are being carried forward."

11. On 24 August 2015 his UK tax adviser (who had recently taken over responsibility for dealing with Mr Hart's UK tax affairs from a colleague) replied to the effect that Mr Hart would not be able to offset his property rental losses against any capital gain on the sale of the Property.

12. It was clear that the UK tax advisers were aware that Mr Hart resided in Australia.

13. On 30 September 2015, Mr Hart sent a further email to his tax adviser, as follows:

> "As you may have seen from my file I have an investment property in [sic] UK and a service company (Nexberry) which trades infrequently. I have recently sold my investment property (August 2015) and [sic] considering closing Nexberry effective 31 October.
>
> …
>
> In any event, please find attached the financial statements that I prepare for my rental property which shows a small loss for the year. I trust the file is pretty self-explanatory but do not hesitate to ask me any questions….
>
> I am available to discuss further if you would like to arrange a time to speak….
>
> I look forward to hearing from you."

14. There is no record of any response to this email in the papers before me.

15. In November 2016, during the preparation of Mr Hart's UK tax return for the year ended 6 April 2016 by his UK tax advisers, it was established that a non-resident

capital gains tax return ("NRCGT return") should have been filed. The NRCGT return was finally submitted online on 17 or 18 November 2016.

16. In a letter of 30 March 2017 to HMRC, Mr Hart's tax advisers said:

> "Furthermore, Mr Hart employed the services of a solicitor to handle the disposal of the property in the UK and at no point did the solicitor inform him of the need to file a Non-Resident CGT Return.
>
> We would also like to concede the point that Mr Hart asked us for CGT advice and the individual responsible for managing his case was unaware of the new CGT return or the need to file it within 30 days of the disposal. This individual is no longer with the firm. When their replacement came in and they went to complete the self-assessment tax return in December 2016 they noticed that the CGT return had not been completed and informed Mr Hart and filed the CGT return straightaway. Mr Hart was completely reliant on his Accountant's [sic] and Solicitor who let him down on this occasion. Mr Hart has always filed his tax returns on time and has always arranged for payment promptly."

17. Mr Hart's UK tax advisers asked that the penalty decisions should be reviewed and the review decision ("the review decision"), which upheld the penalties, was issued on 28 April 2017. Mr Hart then appealed to this Tribunal.

The law

18. In the Finance Act 2015, and with effect in relation to disposals made on or after 6 April 2015, Parliament introduced new sections into the Taxes Management Act 1970 ('TMA') to make non-residents liable to make new returns, i.e. NRCGT returns, as follows:

> "**S12ZB NRCGT return**
>
> (1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and 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 an NRCGT return is the 30th day following the day of the completion of the disposal to which the return relates. But see also section 12ZJ(5)."

19. The penalties for failing to make an NRCGT return are contained in Schedule 55 of the Finance Act 2009 ('FA 2009').

20. 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. With effect from 26 March 2015, a NRCGT return under s 12ZB of TMA 1970 was added to the Schedule by Finance Act 2015 section 37 and Schedule 7 paragraph 59.

21. Paragraph 3 of 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% if the return is 6 months late, but with a minimum penalty of £300; paragraph 6 permits HMRC to impose a tax-geared penalty of up to 200% if the return is more than 12 months late, but again with a minimum penalty of £300.

22. 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. Curiously, there are two potentially applicable provisions, which are not identical. As both appear to be applicable, I have concluded that the taxpayer could rely on both. First, there is section 118(2) TMA which means that where there is a reasonable excuse, the return is deemed not to be late (and so liability to the penalty does not arise). The second is paragraph 23 Schedule 55 FA 2009 which provides that where there is a reasonable excuse, although the return remains late, the penalty must be discharged.

23. The only differences between the two provisions is that paragraph 23 specifically refers to the extent to which insufficiency of funds (not relevant in the present appeal) and reliance on a third party could amount to a reasonable excuse, whereas section 118(2) TMA makes no such reference.

24. Paragraph 23(1) provides:

> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) for the purposes of sub-paragraph (1) -
>
> (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

25. Section 118 TMA (2) provides:

> "For the purposes of this act, the person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

Grounds of appeal

26. On behalf of Mr Hart it was said that he had a reasonable excuse for failing to file the NRCGT return on time.

27. It was said that the new system for filing NRCGT returns was neither widely known nor widely publicised.

28. Mr Hart had filed NRCGT return as soon as it was realised that one was required.

29. Mr Hart had, over the prior 10 years, a good compliance record and took his UK tax obligations seriously.

30. Mr Hart had not been aware that a NRCGT return was required.

31. In addition, in the appellant's Statement of Case, it was argued that Mr Hart had taken reasonable steps to ensure that the disposal of the Property complied with laws in the UK. First, he employed a UK solicitor to deal with the sale of the Property. It was reasonable to expect in such a professional would advise of any implications of the transaction. For example, conveyancers typically prepared and filed stamp duty land tax returns.

32. Secondly, Mr Hart twice advised his UK tax adviser of the sale of the Property. Although Mr Hart never asked specifically for advice on the tax implications of the sale, his notification of the sale both shortly before and shortly after completion showed a clear intention to keep his UK tax affairs in order.

33. Thus, although Mr Hart employed to professional advisers who were aware of the sale of the Property, neither advised him of the requirement to submit a NRCGT return. This, therefore, constituted a reasonable excuse.

34. In addition, Mr Hart's Statement of Case referred to two recent decisions of this Tribunal in *McGreevy v HMRC* [2017] (Judge Thomas) UKFTT 690 (TC) and *Saunders v HMRC* [2017] UKFTT 765 (TC) (Judge Connell) which related to

NRCGT returns. These decisions held that a non-resident's failure to appreciate the need to file a NRCGT return could be a reasonable excuse for the purposes of paragraph 23 Schedule 55 FA 2009.

35. Next, it was said on Mr Hart's behalf that there were "special circumstances" within the meaning of paragraph 16 Schedule 55 FA 2009. A mass misunderstanding or ignorance of the rules by many accountants represented "uncommon or exceptional" circumstances. Furthermore, in accordance with HMRC's Compliance Manual (paragraph 170600) special circumstances were circumstances which were either:

- uncommon or exceptional, or
- were the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.

36. In relation to the second point, it was pointed out that HMRC's document "HMRC Penalties: a Discussion Document" stated that:

> "1. The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.
>
> 2. Penalties should be proportionate to the offence and may take into account past behaviour."

37. It was argued on Mr Hart's behalf that the penalties did not achieve objective 1. Above. Mr Hart was a compliant taxpayer. There was no need to punish him for the failure to submit a NRCGT return. In any event, the penalties were disproportionate to the offence. No tax was avoided – no capital gains tax was payable on the disposal of the Property.

HMRC's case

38. HMRC contended that Mr Hart should have submitted a NRCGT return within 30 days of the disposal of the Property. In this case, the return was submitted on 17 November 2016 and was, therefore, late by 418 days.

39. HMRC also argued 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 in the public domain from early 2015. Information was also published on the Internet on 6 April 2015 – four months before the disposal of the Property.

40. HMRC contended that Mr Hart (I merely observe that HMRC's Statement of Case referred to him at this point as "Mr Chapman") had an obligation to stay up-to-date with legislation affecting his activities in the UK. HMRC would have expected Mr Hart, acting as a prudent person, to have researched what was expected regarding

his tax obligations. HMRC can see no reason why Mr Hart could not access HMRC's website whilst in Australia as it was published on the World Wide Web.

41. It was unrealistic, argued HMRC, to expect HMRC to contact every non-resident individual who may wish to sell a UK property. HMRC had made the information available and it remained the taxpayer's statutory duty to make themselves familiar with the requirements and comply with the regulations.

42. Accordingly, in HMRC's submission, Mr Hart did not have a reasonable excuse.

43. In addition, the question of "special circumstances" had been considered and none were found to exist.

Discussion

What is a reasonable excuse?

44. Parliament has provided that a taxpayer will not be charged penalties for a compliance failure if, in broad terms, the taxpayer had a reasonable excuse. It is well established that the concept of "reasonable excuse" is an objective test applied to the circumstances of the individual taxpayer.

45. Many decisions of this Tribunal, in my respectful view correctly, have adopted the words of HH Judge Medd OBE QC in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 where he explained the concept of "reasonable excuse" in the following manner:

> "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. It 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 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 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. 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."

46. In addition, Judge Berner in *Barrett v HMRC* [2015] UKFTT 329 at [154], with whom I respectfully agree, said:

> "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?

47. One of the issues which arises on this appeal is whether Mr Hart's lack of awareness of the need to file NRCGT return could, of itself, constitute a reasonable excuse. In other words, can ignorance of the law (or, more accurately, an obligation imposed by the law) constitute a reasonable excuse within either paragraph 23 or section 118(2).

48. On this point, there has been a divergence of view in this Tribunal. In *McGreevy* and *Saunders* both Tribunals held that, in each case, the taxpayer's lack of awareness of the obligation to file a NRCGT return could amount to a reasonable excuse. Mr Hart relies on these decisions. In *Welland* v *HMRC* [2017] UKFTT 870 (TC) and *Hesketh* v *HMRC* [2017] UKFTT 871 (TC) (both decisions of Judge Mosedale), however, the Tribunal disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

49. Of course, all four of these decisions are decisions of the First-tier Tribunal and are not binding upon me. It is open to me to depart from any of these decisions if I conclude that I must do so.

50. With respect to the Tribunals in *McGreevy* and *Saunders*, I prefer Judge Mosedale's decisions in *Welland* and *Hesketh* and intend to follow those decisions rather than *McGreevy* and *Saunders*.[1]

51. I have reached this conclusion for the following reasons.

52. First, in *McGreevy* and *Saunders* it was said that the maxim "ignorance of the law is no excuse" was confined to the criminal law rather than to civil law matters. In my view, with respect, that conclusion is incorrect.

53. In *Cenlon Finance Co, Ltd v Ellwood (H M Inspector of Taxes)* [1962] UKHL 40 TC 176 Lord Denning said at 207:

> "Mr. Shelbourne [counsel for the taxpayer] took another point. He said that the Inspector of Taxes, with full knowledge of the facts, at first allowed this dividend to pass untaxed, and that his successor in office cannot be allowed to bring it into the assessment simply because he takes a different view of the legal position. He must "discover" an under-assessment. Mr. Shelboume said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an Inspector of Taxes. I am afraid I cannot agree with Mr. Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law."

54. I acknowledge that Lord Denning was not dealing with the concept of reasonable excuse but, instead, with whether an Inspector of Taxes had made a "discovery". Nonetheless, there is no suggestion by Lord Denning that the maxim "ignorance of the law is no excuse" applied only in relation to the criminal law.

55. In *HMRC v Kearney* [2010] STC 1137 the taxpayer had been working abroad. Later, on his return, he applied to HMRC to be allowed to make voluntary national insurance contributions – an application which HMRC refused. The taxpayer was allowed by virtue of regulation 32 of the relevant regulations to make further voluntary contributions if "his failure [to make contributions] is shown to the satisfaction of the Secretary of State to be attributable to ignorance or error on his part which was not due to any failure on his part to exercise due care and diligence." In the Court of Appeal, Arden LJ (with whom Sullivan and Neuberger LJJ concurred) said at [30]:

> "In many situations a contributor has a legal duty, backed up by a criminal sanction, to make contributions. That is not so in Mr Kearney's case as he was working abroad. When it comes to performing one's duty, the general principle of English law is that ignorance of the law is no defence. What reg 32 of the 1969

[1] I note that *Welland* and *Hesketh* have recently been followed by this Tribunal in *Jackson v HMRC* [2018] UKFTT 64 (TC)(Mr Sheppard).

> Regulations achieves in a case where a contributor is under a duty to make contributions is a way of performing the duty out of time and it provides a set of conditions in which the contributor is excused from the consequences of his ignorance of his legal duty. This is an exceptional course, and the onus will be on him to bring himself within the conditions."

56. Again, I accept the context was not specifically dealing with the defence of "reasonable excuse". It is apparent, however, that Arden LJ considered the maxim "ignorance of the law is no defence" to be a "general principle of English law". There was no suggestion that Arden LJ considered the principle to be confined only to the criminal law.

57. In *Customs and Excise Commissioners v Salevon Ltd ; Customs and Excise Commissioners v Harris and another* [1989] STC 907 Nolan J held that a taxpayer's ignorance of the requirement to register for VAT could not be a reasonable excuse. Nolan J said at page 913:

> "One must start, I think, from the accepted fact that Mr and Mrs Harris were legally obliged to register their business in March 1987. Ignorance of the law is no excuse for their having failed to do so, nor have they ever suggested that it was."

58. Similarly, in *Neal v Customs and Excise Commissioners* [1988] STC 131 the taxpayer failed to register for VAT. The Value Added Tax Tribunal accepted that the taxpayer had no knowledge of VAT law but held that ignorance of the law could not be a reasonable excuse. On appeal, Simon Brown J upheld the Tribunal's decision that ignorance of basic VAT law could not be a reasonable excuse. I shall return shortly to the decision in *Neal* because it did suggest that the maxim concerning ignorance of the law was not absolute. For present purposes, however, it is clear that Simon Brown J did not consider that the maxim was confined to the criminal law.

59. So far, I have reviewed cases concerning with tax law. But it is plain to me that the civil courts have similarly applied the rule that ignorance of the law is no excuse. The rule, to give a few examples, has been held to apply in the context of tort (*Central Asbestos Co Ltd v Dodd* [1973] AC 518 at 549, [1972] 2 All ER 1135 at 1154 per Lord Simon of Glaisdale, and at 556 and 1161 per Lord Salmon), Scottish bankruptcy law (*Carter v McLaren* (1871) LR 2 Sc & Div 120 at 125-126 per Lord Chelmsford) and the obligation to notify the Secretary of State of a proposal to dismiss employees on the basis of redundancy (*Secretary of State for Employment v Helitron Ltd* [1980] ICR 523, Slynn J).

60. I have, therefore, concluded that the Tribunals in *McGreevy* and *Saunders* were incorrect to decide that the principle, that ignorance of the law provides no excuse, was one that was confined to the criminal law. In my judgment it applies to penalties under Schedule 55 as in any other field of law.

61. The principle is not, however, an absolute one. There are limits to its application. An example of one such limit is the decision of Simon Brown J in *Neal* to

which I have already referred. That case involved the failure of a 19-year-old model to register for VAT. Simon Brown J, referring to an earlier decision of the VAT Tribunal (Mr DC Potter QC) said at page 135:

> "It seems to me essential to recognise a distinction between on the one hand basic ignorance of the primary law governing value added tax including the liability to register and on the other hand ignorance of aspects of law which less directly impinge upon such liability. I believe that this distinction was recognised by Mr Potter and is to be found reflected in the passage I have cited from his decision in *Geary*. It must be appreciated that the question of law about which the taxpayer was ignorant there was whether he was employed or self-employed, perhaps equally a question of fact and degree as one of law. It was not as if the taxpayer was unaware that, were he carrying on business, he was liable to be registered whereas if he was employed he was not."

62. Simon Brown J continued at page 136:

> "In the result, whilst not accepting the wider submissions of either party, I have decided that the tribunal was right to conclude that they were bound to reject the taxpayer's argument that she could invoke her ignorance of basic value added tax law as reasonably excusing her default. That, it is plain from the context, is all that the tribunal meant when they said that, 'ignorance of the law cannot be an excuse'. This case was simply not concerned with the taxpayer's ignorance other than of basic value added tax law let alone ignorance of mixed law and fact. Had it been, then in my judgment the tribunal ought certainly to take such matter into account as part of the overall facts of the case. Indeed, despite the wider submission of counsel for the commissioners as to the proper approach to s 15(4), I am reassured to learn that the commissioners have in fact been treating as a reasonable excuse circumstances falling far short of physical inability to comply with the statutory requirements. These circumstances, I am told, include cases where there is doubt whether the trader is employed or self-employed or whether the supplies being made are indeed taxable, doubts which generally would arise out of difficult questions of law.
>
> In this case, however, there could be no doubt. The default was entirely the product of basic ignorance of value added tax law. That cannot be construed as a reasonable excuse."

63. I agree with Judge Mosedale's summary (at [77] of *Welland*) of Simon Brown J's decision in *Neal*:

> "The decision in *Neal* suggests therefore that while generally speaking, ignorance of the law will not be a reasonable excuse where a civil tax penalty is concerned, there are cases where complex, or at least uncertain, law is involved, where it may be."

64. I also agree with Judge Mosedale's conclusion at [87]-[89] that the decision in *Neal* should only be applied in rare cases. Much of the UK's extraordinarily

voluminous tax code is complex but, as Judge Mosedale 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 tax 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 do not think it is 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.

65. A second exception to the general maxim concerning ignorance of the law is, perhaps, to be found in the early case of *Cooper v Phibbs* (1867) LR 2 HL 149. In that case Lord Westbury drew the following distinction at 170

> "It is said, 'Ignorantia juris haud excusat;' but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

66. Finally, a third possible exception to the general principle was vividly illustrated in the remarkable case of *R v Chambers* [2008] EWCA Crim 2467. The case involved a confiscation order against the defendant under the Proceeds of Crime Act 2002 concerning the knowing dealing with tobacco products, which were chargeable with a duty which had not been paid, with intent to defraud the Crown of the duty chargeable on the goods contrary to section 170(1)(b) of the Customs and Excise Management Act 1979. The case was brought by HMRC's Prosecutions Office. In order to decide whether the offender had obtained a benefit in the form of the evasion of a liability, it was necessary to determine whether the offender had a liability which he avoided. That question turned on whether the appellant was liable for the payment of excise duty on the tobacco goods under the relevant Regulations.

67. The Regulations relied on by HMRC at the hearing of the appeal were the Excise Goods Regulations 1992 and the Court of Appeal heard argument on those regulations from both parties. The Court of Appeal reserved its judgment.

68. The Court of Appeal then issued a draft judgment to the parties. The day before the final judgment was to be delivered, an HMRC lawyer discovered that the Excise Goods Regulations 1992 had been superseded by other Regulations and no longer applied to tobacco products. The new Regulations were in materially different form. Accordingly, the Court of Appeal allowed the appeal and quashed the confiscation

order. HMRC's counsel had based his understanding of the relevant law on the Office of Public Sector Information web site, which showed the Excise Goods Regulations 1992 in their un-amended form. Moreover, the Court of Appeal was aware that other cases had proceeded on the basis of the wrong regulations. It was apparent that within HMRC there was "considerable ignorance" about which regulations were in force. Toulson LJ (who, with respect, was clearly and understandably disturbed by this sequence events) made the following comments:

> "64. This case also provides an example of a wider problem. It is a maxim that ignorance of the law is no excuse, but it is profoundly unsatisfactory if the law itself is not practically accessible. To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it. There are four principal reasons.
>
> 65. First, the majority of legislation is secondary legislation.
>
> 66. Secondly, the volume of legislation has increased very greatly over the last 40 years. The Law Commission's Report on Post-Legislative Scrutiny, (2006) Law Com 302, BAILII: [2006] EWLC 302, gave some figures in Appendix C. In 2005 there were 2868 pages of new Public General Acts and approximately 13,000 pages of new Statutory Instruments, making a total well in excess of 15,000 pages (which is equivalent to over 300 pages a week) excluding European Directives and European Regulations, which were responsible for over 5,000 additional pages of legislation.
>
> 67. Thirdly, on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation.
>
> 68. Fourthly, there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is, or was at the date with which the court is concerned, and are entirely dependent on the parties for being able to inform them what were the relevant statutory provisions which the court has to apply. This lamentable state of affairs has been raised by responsible bodies on many occasions, including the House of Lords Committee on the Merits of Secondary Legislation. In its Report on Post-Legislative Scrutiny, under the heading "Access to legislation and consolidation", the Law Commission stated:
>
> "4.11. One theme related to delegated legislation, on which a number of consultees commented, was access to legislation. The joint response of the Children's Legal Centre and National Children's Bureau addressed the problem that despite their familiarity with the broader legal framework, they still found access to be a real problem:
>
> 'The lack of access to statutes with appropriate links to the regulations and guidance which are currently in force must be a cause of serious inconvenience to anyone who does not have access to specialist services. We are concerned when information so fundamental to a

democracy is difficult to identify, obtain and understand, and is frequently out of date. It is frequently the case that secondary legislation and guidance are overlooked in the process of scrutiny, although their impact on the day-to-day operation of the law is as significant as the primary statute.'

4.12. The joint response stated that experience of practice in childcare suggests that many injustices are the result not of failure to comply with the statute, but of failure to know about, understand or access secondary legislation."

69. The problem is not confined to secondary legislation relating to childcare. It affects many other areas of law of great impact on the ordinary citizen, such as social security benefits.

70. The Law Commission concluded this section of its report as follows:

"4.15. It is also important that all related statutory provisions, whether primary or secondary, should be capable of being readily accessed together. We are aware of the work being undertaken on the Statute Law Database and recognise that public access to that resource is a step in the right direction. **We recommend that steps should be taken to ensure that the related provisions of primary and secondary legislation should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search**."

71. The Government's response to that recommendation was presented to Parliament in March 2008, CM 7320. It stated as follows:

"35. Her Majesty's Stationery Office (HMSO) and the Statutory Publications Office (SPO), which produces the Statute Law Database, are to work together to create a single, powerful and free to access online legislation service. The launch of the SLD has been a milestone in government's online legislation publishing.

36. Over the last two years HMSO, via the OPSI website (www.opsi.gov.uk) has embarked on wide ranging improvements to how legislation is published online, taking account of key usability features for layout and navigation. This work is being undertaken as part of 'The Transforming Legislation Publishing Programme'. The aim has been to present legislation in the most accessible and usable way, whilst maintaining the traditional strengths of immediacy and accuracy. One of the benefits is that it affords the opportunity to provide links to related information. Initially these links will be to the Explanatory Note for Acts or the Explanatory Memorandum for Statutory Instruments. Alongside this is also published an ATOM feed for the piece of legislation. This provides visitors with an easy way to keep up to date with subsequent additions to the website, like the addition of Explanatory Notes for an Act, and also the enacting or making of other related legislation such as Commencement Orders or, longer term, amending legislation. In future HMSO will be adding

> explicit links to Commencement Orders, and where legislation implements an EU Directive, a link also to that Directive.
>
> 37. HMSO/OPSI and SPO will continue to work together and with government's online legislation visitors, to improve the service and ensure that UK legislation is available in a high quality and straight forward terms, with a freely available and powerful search."
>
> 72. The aim is laudable, indeed imperative, but there is a long way to go and meanwhile the volume of legislation advances apace. It is a serious state of affairs when the relevant legislation is not accessible, the Government's own public information website (OPSI) is incomplete and the prosecution in an excise case unintentionally misleads the court as to the relevant Regulations in force. Although the problem has in this case arisen in an excise context, it is part of a wider problem of substantial constitutional importance."

69. It is therefore possible that where it is not reasonably feasible to discover the exact terms of the law, a taxpayer may have a reasonable excuse for failure to comply with his or her statutory obligations. In addition, in cases where the obligation is enforced by penalties which constitute a criminal offence under the *Engel* criteria (*Engel and others v The Netherlands* [1976] ECHR 3) a breach of Article 7 of the Convention may be involved (the *Engel* criteria were held to apply to Article 7 in *Irving Brown v United Kingdom* 38644/97).

70. However, none of these actual or possible exceptions to the general rule that ignorance of law is not an excuse seem to be relevant in this case, as I shall explain.

Was Mr Hart's ignorance of his NRCGT return obligation a reasonable excuse?

71. In my view, the fact that Mr Hart was unaware of his obligation to file a NRCGT return within 30 days after the disposal of the Property cannot, of itself, constitute a reasonable excuse.

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 Mr Hart that the obligation to file a NRCGT was not sufficiently publicised. It was publicly announced and advertised online. I agree with Judge Mosedale who considered that it was impractical for HMRC to attempt to communicate individually with every potentially affected non-resident taxpayer.

74. In my view, therefore, none of the possible exceptions to the rule that ignorance of the law is not an excuse, to which I refer earlier this decision, can apply.

75. I therefore conclude that Mr Hart's lack of awareness of his obligation to file a NRCGT return was not a reasonable excuse.

Reliance on a third party

76. Mr Hart's disposal of the Property was handled by a solicitor. In addition, Mr Hart mentioned the disposal to his UK tax adviser shortly before and shortly after it occurred. Neither the solicitor nor his UK tax adviser warned him of the need to file a NRCGT return.

77. 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 the need to file a NRCGT return.

78. In relation to Mr Hart's UK tax advisers, I think the picture is slightly different. He clearly had a continuing relationship with this particular firm of accountants and they advised him on his UK tax affairs.

79. I have referred above to emails from Mr Hart to his UK tax advisers dated 18 August 2015 and 30 September 2015. In both of these emails Mr Hart refers to the disposal of the Property. I would have expected a competent UK tax adviser to have informed Mr Hart of the need to file a NRCGT return. Although the appellant's Statement of Case suggests that Mr Hart never specifically asked for advice on the tax implications of the sale, I would have thought that that was unnecessary when Mr Hart was communicating with his regular tax advisers. Indeed, the letter of 30 March 2017 from Mr Hart's UK tax advisers to HMRC seems to accept that they should have alerted Mr Hart to the need to file a NRCGT return.

80. In any event, I am not sure that it is strictly correct to say that Mr Hart never specifically asked for tax advice in relation to the sale of the Property. Mr Hart did raise the tax question with his tax advisers concerning whether he could offset rental losses against any capital gain from the sale of the Property. The requirement to file a NRCGT return was a new one and I would have expected a competent UK tax adviser in the circumstances to advise a client about the need to submit a return.

81. In my view, therefore, I consider that by informing his regular UK tax advisers of the disposal of the Property (both before and shortly after the event) Mr Hart could reasonably have expected them to advise him of the need to submit a NRCGT return.

82. As I have mentioned, there are two different provisions upon which Mr Hart can rely in relation to a "reasonable excuse" defence.

83. The first provision is paragraph 23 schedule 55 FA 2009. So far as relevant, paragraph 23(1) provides:

> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) for the purposes of sub-paragraph (1) -
>
> …
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

84. Paragraph 23(2)(b) provides that reliance on a third party "to do anything" is only a reasonable excuse if the taxpayer can demonstrate that he or she took reasonable care to avoid the failure (i.e. the failure to make a return).

85. It seems to me that when Mr Hart informed his tax adviser that he was intending to dispose of the Property, in circumstances where it was known that Mr Hart was non-UK resident for tax purposes and where he could reasonably expect UK tax advice in relation to the information supplied, that is enough to establish that Mr Hart took reasonable care to avoid the failure to submit a TRCGT return. Indeed, having specifically informed his UK tax advisers of the disposal of the Property, it is hard to see what more Mr Hart could reasonably have done. On this occasion, his UK tax advisers seem to have let him down.

86. In any event, the second provision on which Mr Hart can rely in relation to a "reasonable excuse" defence is section 118(2) TMA. This contains no equivalent to paragraph 23(2)(b). The only question is whether in all the circumstances Mr Hart had a reasonable excuse for his failure to file a NRCGT. For the same reasons as given above, I have decided that Mr Hart did have a reasonable excuse. He could reasonably have expected his UK tax advisers to inform him of the need to file the return, having informed them of the disposal of the Property.

87. As regards paragraph 23(2)(c), it is apparent that as soon as Mr Hart and his tax advisers discovered his failure to submit a NRCGT return, they took steps to file a return immediately. There was no undue delay in correcting the failure to have previously submitted the return.

88. In the light of my conclusion that Mr Hart had a reasonable excuse for his failure to file a NRCGT return, it is unnecessary for me to consider whether there

were "special circumstances" within the meaning of paragraph 16 Schedule 55 FA 2009. It is also unnecessary to consider the appellant's argument that the penalties in this case were disproportionate.

Decision

89. For the reasons given above, I allow Mr Hart's appeal.

90. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2018