[2019] UKFTT 0217 (TC)

# TC07064

**Appeal number: TC/2017/08066 and TC/2017/00831**

***CGT – non resident CGT return- penalty for failure to submit in time.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ROBERT KIRSOPP and RACHEL KIRSOPP** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER**

**The Tribunal determined the appeal on 11 June 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 November 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 7 March 2018 and the Appellant's Reply dated 17 April 2018 (with enclosures).**

1. The appeals relate to penalties assessed under Sch 55 Finance Act 2009 ("FA 2009") for the failure to make a non-resident CGT return (an "NRCGT return") within 30 days after the completion of the sale of a residential property in the UK. This decision addresses both Mr Kirsopp's and Mrs Kirsopp's appeals.

## The Applicable Legislation

*(a) Non resident CGT Returns*

2. The Finance Act 2015 inserted provisions into the Taxation of Chargeable Gains Act 1992 ("TCGA) which brought into charge to CGT any gain made by a non

resident on the disposal of an interest in a residential property in the UK; at the same time sections 12ZA to 12ZN were inserted into Taxes Management Act 1970 ("TMA") with effect for disposals made after 6 April 2015. The new provisions in TMA required the making of an NRCGT return in relation to such a disposal within 30 days of the completion of the disposal.

3. The new TMA provisions were, in the field of personal taxation novel in two respects: first, they required a specific return for the disposal rather than its declaration in a normal self assessment return (together with all other income and gains), and second, they required the return not to be made only after the receipt of a notice from HMRC requiring it to be made, but to be made automatically.

4. The relevant provisions are the following.

5. Section 12ZB Taxes Management Act 1970 ("TMA") provided:

> "(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."

6. By subsection (2) the "appropriate person" in the case of an individual is the taxable person in relation to the disposal, and by subsection (8) the filing date is the 30th day following the day of completion of the disposal to which the return relates.

7. By subsection 12ZA(4) and section 14B Taxation of Chargeable GainsAct 1992 ("TCGA"), a non-resident CGT disposal included a disposal (as that term had effect in the TCGA) of a UK residential property interest by an individual who was not resident in the UK for the tax year in which any gain on the disposal would accrue.

8. It is common ground (and I find) that the Appellants were non UK residents for relevant tax years who completed the sale of such a property and did not make a return of the sale within the 30 day period required by section 12ZB TMA.

*(b) The penalty provisions*

9. Sch 55 FA 2009 imposes penalties for the failure to make certain returns. Para 1 provides that a penalty is payable by a person who fails to deliver a return specified in the Table on or before the date on which it is required to be made or delivered to HMRC. Item 2A of the Table specifies an NRCGT return under section 12B TMA.

10. Para 3 provides for a penalty of £100; para 4 for a penalty of £10 for each day the failure continues after the end of 3 months after the day after the filing date if HMRC decide that such a penalty should be payable and give notice to the taxpayer specifying the date from which the penalty is payable; para 5 provides for a penalty of £300 (or if more 5% of the tax) if the failure to deliver the return continues after the end of 6 months form the filing date; and para 6 inter alia for a further penalty of £300 (or, if more, 5% of the tax liability) if the taxpayer's failure continues beyond a year after the day after the filing date.

11. Para 16 Sch 55 provides that if HMRC think it right because of "special circumstances", they may reduce a penalty, and by para 22, on a appeal to this tribunal, the tribunal may substitute its own decision for that of HMRC if they consider that HMRC's decision is flawed in a judicial review sense.

12. Para 17 provides that where a person is liable to a penalty "which is determined by reference to a liability to tax" under more than one paragraph of the Schedule, the aggregate penalties shall not exceed, in the case of penalties of the nature now under consideration the amount to the tax liability.

13. Para 23 Sch 55 provides that liability to a penalty under the schedule does not arise in relation to a failure to make a return if the taxpayer satisfies a tribunal on appeal that there is a reasonable excuse for the failure, and provides that if an excuse ceases but the taxpayer remedies the failure without unreasonable delay after the excuse has ceased, the excuse is to be treated as having continued.

**The Issues in the Appeals**

14. With the exception of an argument about para 17(3) Sch 55, there was no dispute that the technical requirements in Sch 55 for the assessment of the penalties were satisfied and that the amounts of the penalties were, subject to the issues described below, calculated correctly.

15. The issues in these appeals are thus: (i) whether the Appellants have a reasonable excuse within para 23 Sch 55 for the failures and (ii) if not, whether the special circumstances provision in para 16 Sch 55 can permit a reduction in the penalties and whether para 17 has any relevant effect.

**Finding of Fact**

16. From the papers before me I find as follows.

17. Mr and Mrs Kirsopp have been resident outside the UK from 2003 but had residential property in the UK. They heard of the Chancellor's proposals in his autumn statement in 2013 to introduce CGT on the disposal by non residents of UK residential property, and on 11 March 2014 phoned HMRC to enquire whether the sale of their former main residence would be subject to the new charge. They were told that it would be and that its sale should be reported in a self assessment tax return although the precise process of reporting had not yet been finalised.

18. In some of their correspondence with Mr and Mrs Kirsopp HMRC suggest that Mr and Mrs Kirsopp became "aware of the requirement to file a NRCGT return as they called HMRC on 11 March 2014 regarding the changes". However HMRC provide no evidence that Mr and Mrs Kirsopp were told that a return separate from the normal self assessment return would be required or that it would be required on an accelerated timetable. I find that they were not told that a separate return would be required on a timescale different from that applicable to self assessment returns.

19. Mr and Mrs Kirsopp completed the sale of their former main residence on 24 July 2015 and Mrs Kirsopp completed the sale of two other houses on 31 March 2016 and 17 August 2016.

20. In August 2016 Mr and Mrs Kirsopp provided their accountant with the details for their 2014/15 self assessment returns. The accountant discovered that a separate NRCGT returns were required which should have been made much earlier. Their NRCGT returns were then completed in respect of all three disposals by 24 September 2016.

21. In October 2106 HMRC sent notification that no CGT was payable but that penalties, now reduced to £700 for Mr Kirsopp (being £100 under para 3 Sch 55, £300 under para 5 Sch 55, and £300 under para 6 Sch 55, since the return was more than a year late), and £900 for Mrs Kirsopp (being £700 as for Mr Kirsopp in relation to the disposal of their main residence and £100 for each of her other disposals), were due. It appears that no penalty was charged under para 4 Sch 55. Against those penalties Mr and Mrs Kirsopp now appeal.

**Reasonable Excuse**

22. If a taxpayer has a reasonable excuse for a failure occasioning a penalty then para 23 Sch 55 provides that a penalty does not arise in respect of it.

23. HMRC contend that Mr and Mrs Kirsopp had no excuse for the failure to deliver a NRCT return because:

(1) ignorance of the law is not a reasonable excuse;

(2) the Appellants had an obligation to stay up to date with the law;

(3) on a sale of a UK property a reasonable person would have researched what was expected under the law and would have found the information on the Gov.uk website about making a NRCGT return within 30 days; and

(4) the failure of their UK lawyers to alert them of the obligation to make a return (as must have been the case) did not found a reasonable excuse because the Appellants did not take reasonable care to avoid the failure.

24. Mr and Mrs Kirsopp contend that:

(1) in their circumstances ignorance of the new requirement was a reasonable excuse;

(2) HMRC have accepted it as being such in other cases; and

(3) income from Mr and Mrs Kirsopp's UK properties was reported through their annual self assessment returns required by HMRC's centre for non residents; email reminders of the need to submit such returns were provided by the centre; it was reasonable therefore to expect that notice through the same channel of the new requirement.

**Discussion**

25. One of the most widely accepted descriptions of what constitutes a reasonable excuse is that in *The Clean Car Co Ltd* 1991 VAT TR5695, where the tribunal said that whether or not a taxpayer had a reasonable excuse:

> "should be judged by the standards of reasonableness 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 ... thus though such a taxpayer would give reasonable priority to complying with his duties in regards to tax and would conscientiously seek to ensure his returns were accurate and made timeously, his age and experience, his health and the incidence of some particular difficulty or misfortune ... they all have a bearing on whether ...[he] had a reasonable excuse."

26. That description indicates a standard for reasonable behaviour which must be assessed assuming that the taxpayer gives a reasonable priority, rather than a paramount priority, to compliance with fiscal duties. A paramount priority for fiscal compliance would involve constant vigilance for any change in the law; a reasonable priority will be tempered in particular by having regard to other circumstances.

27. There has been some divergence of opinion among FTT judges as to whether ignorance of the law can found a reasonable excuse.

28. Thus Judge Mosedale in *Hesketh* [2017] UKFTT 871 (TC), a case concerning NRCGT returns said:

> 81. Secondly, even assuming that *Neal* is still good and binding law on this Tribunal, I think (for the above reasons) that the exception [for complex or uncertain law] recognised in *Neal* was intended to be narrow: statutes must be interpreted with Parliament's intentions in mind. Parliament must make laws with the intention they will be obeyed. Therefore, it follows that Parliament must expect people to make an effort to acquaint themselves with the law. Parliament is unlikely to have intended those who don't comply with the law to be excused the penalty simply because they did not know the law: that would encourage people *not* to make an effort to know the law (as they would be excused non-compliance with laws they didn't know about.)
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> 82. So it follows that ignorance of the law cannot have been intended by Parliament (in general at least) to amount to a reasonable excuse for not complying with it. *Neal* recognised an exception for complex, uncertain law but (in line with Parliament's intent) if such exception exists at all, it must be a rare exception.
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> …
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> 88. In conclusion, the normal rule that ignorance of the law is no excuse applies. While I recognise that the reality is that even just the statutory tax laws applicable in this country run to 1,000s of pages and no one can know it all (and I certainly do not), ignorance of the law is not a 'reasonable excuse' for failing to comply with it.
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> 89. The appellants' ignorance of their liability to make NRCGT returns cannot amount to a reasonable excuse. It was the cause of their failure to make timely returns, but it does not excuse their failure. The obligation to file was not complex nor uncertain, nor was any complexity or uncertainty in the law the reason for their failure to file on time. They didn't file on time simply because they were unaware of the obligation to do so. Such ignorance of basic law is not a reasonable excuse.

29. And Judge Brannan came to a similar conclusion, although acknowledging certain exceptions for specialist, complex, or inaccessible law or law of uncertain application, after an extensive review of the authorities in *Hart [2018] UKFTT*.

30. But Judge Thomas came to a different conclusion, again in relation to NRCGT returns in *McGreevy [2017] UKFTT 690 (TC)* as did Judge Connell in *Saunders.*

31. But more recently the Upper Tribunal had this to say on the issue in *Perrin v HMRC* [2018] UKUT 156 (TC):

> 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 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.

32. I do not accept HMRC's argument that a taxpayer has an obligation to keep up with the law. There is no such obligation in the statute: he or she has an obligation to comply with whatever law is on force but that law does not impose an obligation to stay up to date. If he or she does not keep up to date he or she may become liable to a penalty (depending on the circumstances) but that arises from an inexcusable breach of the law not from the failure to keep up to date.

33. In relation to a breach of the law the answer to the question: "what caused the taxpayer's ignorance of the change in the law?" will affect whether he or she acted reasonably. In some cases that cause may well afford a reasonable excuse: for example if the taxpayer had been in a coma, or was advised by HMRC or another reputable source that the law would not or was unlikely to change in a relevant period, or if the taxpayer did not have the mental capacity to understand the possibility of a change in the law; in other circumstances the cause of that ignorance may be unlikely to found a reasonable excuse: for example a simple assumption that there would be no change or a decision to do nothing unless asked to do something by HMRC. In the first set of examples it might be said that the taxpayer acted reasonably having regard to his circumstances and a reasonable priority to tax compliance, in the second the reverse.

34. It seems to me that Mr and Mrs Kirsopp acted reasonably in relation to the declaration of their disposals. They phoned HMRC when they heard of the change in liability to the tax and were given to understand that they should declare the disposals in a self assessment tax return. Although they were told that the precise process had not been finalised it was reasonable for them to assume that the disposals would have to be reported after the end of the tax year in the usual way. The information they received was not such as to alert them to the likelihood of an imminent change which would require greater vigilance, but the opposite. The fact that they received email reminders of the need to file self assessment returns would provide some (small) added comfort that no new action was required.

35. It is certainly the case that after 11 March 2014 Mr and Mrs Kirsopp could have visited HMRC's website's regularly and, if they had, at some stage they would have found details of their obligation to deliver a NRCGT return, but I think that such behaviour would have been that of a perfect taxpayer or of one who had had some intimation of that there might be a special procedure, rather than the actions of a

reasonable one with Mr and Mrs Kirsopp's knowledge. Having regard to what they had been told they displayed a reasonable regard to complying with their obligations.

36. I find that they had a reasonable excuse for their failure and that they remedied that failure within a reasonable time after they discovered the true position.

37. As a result there is no need for me to consider the special circumstances provision or the application of para 17.

**Conclusion**

38. I allow the appeals.

**Right of Appeal**

39. A summary of the tribunal's findings of fact and reasons was released on 18 June 2018. Following a request from the Appellants, 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.

**CHARLES HELLIER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 29 OCTOBER 2018**