[2019] UKFTT 0133 (TC)

TC06999

Appeal number: TC/2018/07852

CGT - penalty for failing to notify chargeability - no reasonable excuse - no special circumstances - penalty proportionate - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CF DAY **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MS ELIZABETH BRIDGE

Sitting in public at Exeter on 29 January 2019

Mr KW Day, the Appellant's husband, for the Appellant

Mr Stuart Macleod, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background

1. This case concerns a penalty of £2,744.72 (the "**penalty**") which has been assessed on the appellant under the provisions of Schedule 41 Finance Act 2008 ("**Schedule 41**"). HMRC contend that the appellant failed to notify HMRC of the disposal of her 50% share in the sale proceeds of land at Riding Cross, Chittlehampton, Devon which was sold on 23 January 2013 for £200,000.

2. HMRC have also visited an interest charge of £1,682.23 on the appellant for late payment of tax. The appellant has appealed against this interest charge. We deal with this aspect of the appeal at [33]below.

Schedule 24 Finance Act 2007

3. Save as otherwise indicated, all references to paragraphs below are to paragraphs in Schedule 41:

(1) A person who is chargeable to capital gains tax in a tax year and who has not received a notice to file a tax return is obliged to notify HMRC that he or she is so chargeable (section 7 Taxes Management Act 1970) ("**TMA 1970**").

(2) HMRC may assess a taxpayer for a penalty if a taxpayer fails to notify HMRC of that chargeability (paragraphs 1 and 16).

(3) The penalty is 30% of the potential lost revenue provided the failure is not deliberate (paragraph 6).

(4) This can be mitigated to a lower percentage (including zero in certain circumstances) if the taxpayer makes a disclosure of the appropriate quality (paragraphs 12 and 13).

(5) HMRC may reduce the penalty for special circumstances (paragraph 14).

(6) A taxpayer may appeal against a penalty assessment (paragraph 17).

(7) A taxpayer may avoid a penalty if he can establish a reasonable excuse for the failure to notify.

(8) Reliance on another or insufficiency of funds cannot (generally) be a reasonable excuse (paragraph 20).

(9) A taxpayer is liable to a penalty even if the failure is that of an agent (paragraph 21(1)); but he is not so liable if he can show that the failure arises because of an act or omission of that agent and he took reasonable care to avoid that failure (paragraph 21(1)).

Evidence and findings of fact

4. The appellant did not attend but was represented by her husband who was also appealing against a penalty and interest for which he had been assessed in connection with the sale of the land and he gave oral evidence. We were also provided with a bundle of documents. From this evidence we find the following facts.

(1) Mr Day has traded as a farmer for a number of years. He has done so as a sole trader. Although Mrs Day, has been involved in running the farm, she has not taken either a salary or profits from it. She is, and has for a considerable time, been employed by a charity based in Exeter.

(2) The appellant and her husband jointly owned land at Coombe Farm, Devon. They owned this land in equal shares. This land included a plot of land on the eastern side of Riding Cross which was sold on 23 January 2013 for £200,000 (the "**Land**").

(3) Mr Day was, around that time, diversifying his farming activities. He was interested in purchasing a holiday cottage (Lyle House Cottage) (the "**cottage**") and when it came up for sale (it was close to one of his fields) he decided to try and raise the funds to buy it. He knew that some of his neighbours had an interest in the Land so he contacted them to enquire further into that interest. Following those conversations he put the Land up for sale through sealed bids. He had to pay £230,000 for the cottage. He was offered £200,000 for the Land. He managed to find finance for the £30,000 difference.

(4) The appellant took no professional advice about the tax consequences of the sale of the land, nor did Mr Day. The appellant relied on Mr Day to tell her the tax consequences, if any, of the sale of her share of the Land. Mr Day undertook some online research. He did not remember which sites he had visited. He could provide us with no printed copies of any research he had read nor any reference matter printed at the time. From his research he understood that he and the appellant were entitled to business asset rollover relief (under section 152 Taxation of Chargeable Gains Act 1992). He considered that this allowed them to effectively "transfer" the sale proceeds from the Land and any gains arising from that sale into the cottage, and so no tax would be payable on the sale of the Land. This was convenient since at that time Mr Day was converting a barn on the farm into holiday accommodation and the cottage would fit neatly into this new business venture.

(5) If Mr Day had thought that he was not entitled to business asset rollover relief, he would not have carried on with the project and would not have sold the Land.

(6) Mr Day understood, from his research, that he did not need to report the sale of the land in his tax return and that relief was available even if the cottage was let out, provided that letting was for only a "short time". Mrs Day, in her Notice of Appeal explained that "I was aware through my husband that there was a potential capital gains liability but because we were rolling over the funds

into an allowable asset we did not know there was a requirement to notify HMRC as there would be not tax to pay."

(7) In fact, shortly after Mr Day acquired the cottage with vacant possession, he let it out on a six month tenancy. He subsequently entered into two further six month tenancies.

(8) The appellant did not notify HMRC about the sale of the Land. HMRC requested information about that sale in a letter dated 1 November 2017. In that letter HMRC explained that in its view the appellant should have reported the sale of the land in a self-assessment tax return and declared the gains that she had made and that she had therefore failed to notify chargeability to tax. HMRC set out a provisional tax calculation showing the appellant's tax liability as being £13,723. Following receipt of that letter, the appellant contacted HMRC, telling them that Mr Day would be dealing with the matter on her behalf.

(9) Mr Day, on behalf of Mrs Day, agreed the tax assessments and tax due with HMRC on 20 November 2017, and following further communications between HMRC and Mr Day on behalf of the appellant, HMRC wrote to the appellant on 13 August 2018 formally assessing the tax and indicating that interest and penalties would also be due.

(10) The appellant was assessed for the penalty on 14 August 2018. The appellant requested a formal review of this assessment, and in their review conclusion letter dated 25 October 2018, indicated that they had completed the review and had concluded that the decision to assess the penalty was upheld.

(11) The appellant had appealed the penalty decision on 28 August 2018, and following the outcome of the review, appealed to the tribunal on 18 November 2018.

Relevant case law

Reasonable excuse

5. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissions* [1991] VATTR 234, in which Judge Medd QC said:

> "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?"

6. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

7. Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner 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."

8. HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

> "So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".
>
> "In HMRC's review it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

Special circumstances

9. There have been a number of cases on special circumstances from which we derive the following principles (see Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs [2015] UKFTT 0095 and the cases cited therein):

> (1) While “special circumstances” are not defined, the courts accept that for circumstances to be special they must be “exceptional, abnormal or unusual” (Crabtree v Hinchcliffe [1971], 3 All ER 967) or “something out of the ordinary run of events” (Clarks of Hove Ltd v Bakers Union [1979], 1 All ER 152).
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> (2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.
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> (3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.
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> (4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(5) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(6) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(7) We can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill in John Dee) *John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941.

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(8) In deciding whether HMRC's decision was unreasonable, the tribunal should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(9) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

"The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(10) Having undertaken that assessment:

(a) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.

(b) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

10. In relation to the doctrine of proportionality and its application to the issues in this case, we have considered the following cases:

(1) *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(2) *International Transport Roth GmbH v Secretary of State for the Home Dept* [2003] QB 728 ("*Roth*")

(3) *James v UK* (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(4) *Wilson v SoS for Trade and Industry* [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(5) *R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent)* [2015] UKSC 41 ("*Lumsden"*)

11. A summary of the principles relating to proportionality are set out below:

(1) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (Lumsden at [33])

(2) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (Lumsden at [23].

(3) In the context of its application to penalties, the principle of proportionality is that:

(a) penalties may not go beyond what is strictly necessary for the objective pursued; and

(b) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (Louloudakis at [67]).

(4) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (Wilson at [62]).

(5) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (Roth at [26]).

Burden and standard of proof

12. The burden of establishing that the appellant is prima facie liable for the penalty which has been properly notified and assessed lies with HMRC.

13. The burden of establishing that she should not be liable for the penalty because, amongst other reasons, she has a reasonable excuse, or that the penalty is disproportionate, lies with the appellant.

14. In each case the standard of proof is the balance of probabilities.

Submissions

Appellant's submissions

15. On behalf of his wife, Mr Day made the following submissions:

(1) Mrs Day has no case to answer. ESC A19 says that HMRC will give up capital gains tax where they have failed to make timely use of information. HMRC had information about Mrs Day and the disposal of her share in the field for some 31 months before acting. They are bound by the provisions of ESC A19 and so cannot recover any tax owed by Mrs Day.

(2) The 31 month delay means that the investigation has not been carried out in a timely manner and so no tax should be charged and any tax paid should be refunded.

(3) Mrs Day thought, on the basis of the research carried out by Mr Day, she could roll over any gains made on the sale of her share of the Land into the cottage and so there was no requirement to notify HMRC of the sale.

(4) Mr Day had carried out adequate and appropriate research into the rollover relief position.

Respondents submissions

16. Mr MacLeod submitted as follows:

(1) This tribunal has no jurisdiction in relation to the application of ESC A19.

(2) It was not reasonable for Mrs Day to believe that rollover relief is available and that therefore there was no need for her to notify chargeability under section 7 TMA 1970.

(3) This was a complex transaction. Her husband had never undertaken a similar transaction before. She should not have relied on him but instead consulted HMRC or their guidance or an appropriately qualified tax adviser.

(4) Since she was not involved in the farming business (her husband traded as a sole trader not in partnership and she has never drawn money out of farm), she could not have obtained relief since she has never been a trader.

(5) Relying on research conducted by her husband is not a reasonable excuse.

ESC A19

17. The provisions of ESC A19 appear to apply to capital gains tax. And on the face of it, could potentially apply to the appellant. However we made clear to Mr Day at the hearing that we might not have jurisdiction to consider the impact of ESC A19 on Mrs Day's appeal. This is HMRC's submission. We have now reviewed the position. We do not think that we have jurisdiction.

18. In the case of *Leroy Haughton* [2018] UK FTT560 ("***Haughton***"), Mr Haughton sought to rely on ESC A19 to oppose a claim by HMRC to recover an over-repayment of income tax. Judge Tony Beare carried out a typically comprehensive and technically rigorous review of the tribunal's jurisdiction in respect of ESC A19. The relevant passage is set out below:

> "13. It is well-established that the First-tier Tribunal does not have a judicial review function and therefore does not have the power to consider whether the Respondents have acted erroneously or inappropriately in refusing to apply an extra-statutory concession. At the hearing, Ms Brown referred me to the decision of Judge Bishopp in the First-tier Tribunal in Prince and Others v The Commissioners for Her Majesty's Revenue and Customs [2012] UKFTT 157 (TC) ("Prince") as support for this proposition. Whilst that decision is not technically binding on me because it is a decision of the First-tier Tribunal, I

agree with the views set out in it in relation to the powers of the First-tier Tribunal judicially to review a decision by the Respondents to refuse to apply an extra-statutory concession.

14. More significantly, although it was not cited to me at the hearing, there are decisions by the Upper Tribunal and the Court of Appeal to the same effect – see Trustees of the BT Pension Scheme v The Commissioners for Her Majesty's Revenue and Customs [2015] EWCA Civ 713 ("BT") at paragraphs [125] et seq. (see paragraph [132] in particular) – and those are binding on me. In that case, both the Upper Tribunal and the Court of Appeal held that the jurisdiction of the First-tier Tribunal (and the Upper Tribunal for that matter) did not extend to a common law challenge to the fairness of the treatment afforded to a taxpayer by the Respondents' refusal to apply an extra-statutory concession.

15. As noted by Judge Bishopp in Prince, the fact that the First-tier Tribunal is unable to perform a judicial review function is not, in and of itself, determinative of the jurisdictional question. That is because there is a considerable body of case law which sets out the extent to which the First-tier Tribunal is entitled to take into account matters of public law in exercising its jurisdiction – see, principally, Wandsworth LBC v Winder [1985] AC 461, Rhondda Cynon Taff BC v Watkins [2003] 1 WLR 1864, Oxfam v The Commissioners for Her Majesty's Revenue and Customs [2009] EWHC 3078 ("Oxfam"), Hok Limited v The Commissioners for Her Majesty's Revenue and Customs [2012] UKUT 363 (TCC), The Commissioners for Her Majesty's Revenue and Customs v Noor [2013] UKUT 71 (TCC) and BT. There is an excellent and thorough summary of the effect on this question of all of the above decisions in the Upper Tribunal decision in R & J Birkett v The Commissioners for Her Majesty's Revenue and Customs [2017] UKUT 0089 (TCC) ("Birkett") at paragraphs [24] and following.

16. I will not rehearse in this decision all that is said about this question in the above decisions but I will confine myself to stating the conclusions that should be drawn from them, as stated by the Upper Tribunal in Birkett, which are that:

(a) the First-tier Tribunal has no general judicial review jurisdiction;

(b) However, it may in certain cases have to decide questions of public law either in the course of exercising the jurisdiction that it does have or to determine whether it has jurisdiction in the first place;

(c) In each case, therefore, in assessing whether a particular public law point is one that the First-tier Tribunal can consider, it is necessary to consider the specific jurisdiction that the First-tier Tribunal is exercising and then to determine whether the particular public law point that is sought to be raised is one that falls to the First-tier Tribunal either in

exercising that jurisdiction or in determining whether it has jurisdiction; and

(d) Since the First-tier Tribunal is a creature of statute, this is ultimately a matter of statutory construction.

17. Applying the above principles in the present case, it is clear that the dispute between the parties does not relate to the amount of tax which is due. That has been agreed. Instead, the dispute relates to whether or not the Respondents ought to have exercised a discretion to waive the tax in view of their prior error and the fact that the Appellant had spent the repayment before he received the assessment. There is nothing in the tax legislation which suggests that the proper exercise of that discretion is a matter which falls within the ambit of the First-tier Tribunal. As Judge Bishopp put it in Prince:

"The position here is very different. The tribunal is not being asked, as in Oxfam, to determine how much tax is due—that has already been agreed—but whether HMRC should be required to exercise their discretion not to collect the tax. That is not a tax dispute at all, but a matter governed by public or administrative law, and precisely the kind of issue which must be determined by judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, be waived could properly be regarded as the province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and Oxfam."

18. The above means that the Appellant's appeal must necessarily fail on the grounds that I have no jurisdiction to hear his appeal. His sole remedy in this case is to seek to rely on the process that exists for making complaints about the behaviour of the Respondents. That means pursuing this issue initially with the Complaints Team within the Respondents – which he has already done - and then, if he is not satisfied with the outcome of that process, asking the Adjudicator for an independent review of his situation. Ultimately, subject to his compliance applicable time limits, he might be able to make a claim for judicial review.

19. For the reasons set out above, I must dismiss this appeal".

19. Although we are not bound by Judge Beare's reasoning and conclusions, we agree with him and we adopt them for the purposes of this appeal. Accordingly, for the same reasons given in *Haughton* we consider that we do not have jurisdiction to consider the application of ESC A19 to the appellant's circumstances.

20. It is also convenient to deal here with the appellant's broader submission that she should be let off the tax since HMRC have been dilatory in carrying out their

investigation. On this point, our view is that it is irrelevant to her liability to the penalty. It does not affect the reasons why Mrs Day failed to notify HMRC of the sale of the Land in the first place. It might be relevant to interest, but that is not something with which we can deal. See [33].

Reasonable care

21. We now turn to reasonable excuse. We apply the test set out at [5] and [7] above. This is an objective test which takes into account the circumstances in which Mrs Day found herself. It is clear from her grounds of appeal that Mrs Day (like her husband) realised that the sale of the Land would generate a taxable gain. But she then relied on her husband who had carried out research into the availability of business asset rollover relief and had come to the conclusion that there was no need to report the sale of the Land on his tax return (and no need for Mrs Day to do so either) since, in his view, each satisfied the conditions for relief.

22. Mr Day was assessed for a penalty for submitting an inaccurate tax return (his 2013 tax return), on the basis that that inaccuracy was caused by his carelessness. Mr Day appealed against that assessment and his appeal was heard together with Mrs Day's appeal. Mr Day represented himself in his appeal, and Mrs Day in her appeal.

23. Although the concepts of carelessness and reasonable excuse are distinct and separate, there is some common ground. And we feel it is important that we set out in this decision what we have said about the care taken by Mr Day in respect of his tax return. It is set out below.

> "This is an objective test but applied to the appellant's particular circumstances. Unfortunately for the appellant we do not think that he has passed this test. We think that he has been careless as that concept is used for tax purposes. We say this for the following reasons:
>
> > Firstly, the appellant's research was either inadequate or he failed to understand what was simply explained in HMRC's guidance. The appellant was unable to describe, precisely, what research he had carried out before he undertook the project. This is hardly surprising given that it was six years or so ago. His evidence was that he would have researched online and that he thinks he would have looked at HMRC's published guidance as well as website articles written and submitted by tax advisers. In our view, if he had read HMRC's guidance properly, it would have been abundantly clear to him that a claim for business asset rollover relief requires the reporting of the sale in a tax return. This is not a complicated instruction. He failed to comply with it. He cannot explain why. If he did not in fact consider HMRC's guidance, then, for the reasons given below, he should have done. Furthermore, the guidance (and we suspect the other website articles he perused) make it clear that the replacement assets must be used in a trading business. The appellant's evidence was that he thought that he could let the cottage out for a short time. And yet, in spite of this, he let the cottage out for three periods of six months as an investment and

not as part of a trading business. So the appellant failed to take into account the very information that he told us that he had researched.

Secondly, the appellant's evidence is that if he had even suspected that business asset rollover relief had not been available he would not have sold the field. So obtaining business asset roll over relief was of fundamental importance to him. Business asset roll over relief is a highly technical relief. If obtaining it was of such importance to the appellant, it is our view that a reasonably diligent taxpayer would have done more than just his own research. Having done some preliminary research, he would have taken advice from an appropriately qualified person who provides specialist tax advice to agricultural clients. Alternatively he could have contacted HMRC and could have written to them asking their view and seeking a ruling which would have given him complete certainty (something a tax advisor may well have advised him to do). The appellant did not do any of this. We appreciate that this might have involved expense. But in our view the appellant should have incurred any such expense in order to ensure that the relief which he claims was so important to him and which, had he not obtained it, would have derailed the project, was properly claimable.

Finally, the appellant says that his research showed that he could let the cottage out for a short time. He let it for three six-month periods the first of which started shortly after he acquired the cottage. Eighteen months cannot be said, by any stretch of the imagination, to be a short time. We are not clear from the papers before us of the date on which the appellant submitted his 2013 tax return but even if he did so at the last minute, in January 2014, one if not two of those six-month periods would already have started if not completed. Furthermore, by the time he submitted his claim for business asset roll over relief in July 2015, all three periods would have expired. It seems to us that the reasonable taxpayer who had discovered that he could only obtain business asset rollover relief if the replacement asset was let out only for a short time should not have claimed it since it would have been clear to him that eighteen months letting as an investment disqualified the claim."

24. The question for Mrs Day, therefore, is whether a reasonable taxpayer would have relied on Mr Day's advice, based on the research he had carried out; whether trusting this advice was reasonable. Alternatively, should she have suggested to Mr Day that he could and should have done more (see [23] above, i.e. sought professional advice, written to HMRC etc), and whether she should have carried out her own independent research (her tax liability is personal to her and is separate from that of her husband).

25. We can understand why Mrs Day relied on her husband as from his evidence she has relied on him for most business and financial decisions involving the farm throughout their married life. However this was an event out of the ordinary for which specialist tax advice was quite obviously necessary.

26. Mr Day attached considerable importance to getting business asset rollover and told us that if he could not get it, he would not have proceeded with the project. We suspect Mrs Day knew this. Mr Day had never before undertaken a transaction as large as this. He has no qualifications to advise tax, nor was there any evidence that he had experience of the tax issues associated with the sales of land for substantial sums. He had no experience of the technical aspects of business asset rollover relief. Mrs Day's position was different from that of her husband. She was not trading. And so she was never going to be able to roll over any gains she made since any replacement asset could never have been taken into, and used in the trade in which the Land had been used

27. It is our view that viewed objectively, reliance on her husband was not a reasonable thing to do (although it is wholly understandable). A reasonable taxpayer in her position would in our view, have tactfully questioned whether her husband had the necessary expertise and questioned him to about the research that he had done and what the results of that research were. She might have asked why he believed they applied to her even though she was not trading. She might, too, have suggested that given that the accuracy of the tax advice was so important, why was he so certain that he was right, and why did he not think to confirm his certainty by writing to HMRC and seeking their written opinion or consulting an appropriate tax adviser.

28. This is not a counsel of perfection. It would in our view be reasonable for the appellant to speak to her husband along these lines and/or undertake independent research. There is no evidence that she did either.

29. And so, regrettably for the appellant, we find that she has no reasonable excuse for failing to notify HMRC of her chargeability to capital gains tax under section 7 TMA 1970.

Special circumstances

30. HMRC indicate that they have taken into account special circumstances but a simple statement to that effect does not, in my view, render the decision lawful. We have seen nothing (apart from that bald statement) setting out what HMRC have taken into account when coming to their decision that special circumstances do not apply, and in light of this, and of any reasons for that decision, it is my view that HMRC's decision regarding special circumstances is flawed. See [9(6)] above.

31. That means, in accordance with the principles set out at [9(10)] above, we must consider whether there are special circumstances which apply to this taxpayer. I do not believe there are. As is mentioned at [9(1)] to comprise special circumstances, they must be exceptional, abnormal or unusual or there must be something out of the ordinary run of events as regards the taxpayer's situation. None of the appellants circumstances fall into either category.

32. And so we find that HMRC have not reached a flawed decision as regarding the application of special circumstances to the appellant's situation.

Proportionality

33. Although not argued by the appellant, it is our view that the penalty is proportionate. In light of the principles set out at [11] above, and in view of the justification for the imposition of penalties (namely that it is essential for the proper functioning of a self-assessed tax regime that the taxpayer provides timely and accurate information) we consider that a penalty for failure to notify chargeability does not go beyond what is strictly necessary for the objective pursued. The penalty is far from being not merely harsh, but plainly unfair. Furthermore, the appellant has been given the maximum discount for disclosure.

Interest

34. The appellant appeals against the imposition of interest. Unfortunately for her, and we think Mr Day recognises this, HMRC's decision to impose interest is not appealable. Interest is statutory so where additional tax is due, interest will apply.

35. This has been made clear to the appellant by HMRC in a letter sent by Jamie Sked to the appellant dated 28 June 2018. In that email, Mr Sked explained that the appellant can dispute the interest charge but can only do so to Mr Sked who would then have to refer the matter to HMRC's Interest Review Unit who would determine the position.

36. Mr Day explained, at the hearing, that neither he nor Mrs Day had taken up this opportunity pending the outcome of their appeals. It is not for us to advise the appellant, but it might now be worth her taking the matter up with Mr Sked and HMRC's Interest Review Unit.

Decision

37. In light of the above we dismiss this appeal.

Appeal rights

38. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 26 FEBRUARY 2019