[2017] UKFTT 870 (TC)

TC06265

Appeal number: TC/2017/3237

NRCGT returns – late filing penalties – what HMRC must prove - whether ignorance of the law is a reasonable excuse – no – whether special circumstances – yes – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT CLIVE WELLAND **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers with the consent of both parties on the basis of their written submissions

The appellant in person.

Ms L Lawrence, HMRC officer, for the Respondents

DECISION

1. The appellant appeals against penalties imposed on him in respect of his failure to file NRCGT returns.

Appeal out of time

2. The appellant lodged his notice of appeal with the Tribunal on 14 April 2017 against a review decision dated 13 February 2017. The last date for making the appeal against that review decision was 16 March 2017. Mr Welland's case was that he did not receive HMRC's decision letter until 22 March 2017 and appealed within 30 days of *receipt* of the letter.

3. HMRC do not suggest that he received the letter more quickly than he said and do not object to the appeal being lodged out of time. Indeed, there is nothing improbable in what Mr Welland says as he lives in Thailand and it is to be expected that post from the UK to Thailand takes weeks rather than days.

4. In all the circumstances, the Tribunal admits the appeal out of time.

Paper determination

5. At the time Mr Welland lodged the appeal, some £4,500 in penalties were in issue. For this reason, the case was categorised as 'standard' with a view to it being determined at an oral hearing.

6. I proposed that the appeal be determined on the papers: shortly after the appeal was lodged, HMRC had withdrawn three sets of daily penalties, bringing the amount in dispute down to £1,800 (within the Tribunal's normal limit for paper determinations); further, as I have said, Mr Welland lived in Thailand and was therefore unlikely to want to attend a hearing in the UK. Lastly, no issue of fact appeared to be in dispute, and so it would not be necessary to hear oral evidence in order to make a fair determination.

7. The parties agreed to a paper determination, and after exchanges of written representations (the last being the appellant's of 13/10/17), I have proceeded to determine the appeal on the papers. This is my decision.

The facts

8. As I have said, the facts were not in dispute, and my below summary is taken from what both parties have agreed about what happened.

9. Mr Welland owned three properties in the UK which he let. He decided to sell them. This was for a number of reasons, such as he no longer wanted the responsibilities of being a landlord, but also because he was aware that the law had

changed and non-residents would be liable to account for capital gains on the disposal of properties in the UK.

10. Mr Welland sold all three properties. The completion dates were 14 May 2015 for the first property, 5 June 2015 for the second and for the last 26 November 2015. He did not put in an NRCGT return on the due dates being 30 days after completion.

11. He assumed that he would have to declare the sales in his self-assessment ('SA') return for tax year 15/16. He started to complete his SA return in August 2016, at which point, on reading the paperwork, he became aware that he ought to have completed NRCGT returns within 30 days of completion of each sale.

12. He completed and submitted the NRCGT returns at that point. It meant that the first two returns were more than a year late; the third return was more than six months late. The returns showed that in each case the disposal date was the same date as completion.

13. As the returns showed, Mr Welland owed nothing in capital gains tax. Although he made a small profit on each of the three sales, the total profit was within his annual capital gains tax ('CGT') allowance.

14. In respect of the returns on all three properties, HMRC levied a £100 late filing penalty and a £300 six months late filing penalty. For the returns due on the first two properties, HMRC also levied a £300 12 months late filing penalty. HMRC had also levied £900 daily penalties in respect of each of the three defaults, but, as I have indicated, later removed these penalties. As I have said, that left the total amount in dispute as £1,800.

15. While the parties were not agreed whether HMRC had taken adequate steps to publish the new reporting requirements, they were agreed on what HMRC had actually done: they were agreed that the new 30 day reporting requirement was made clear on HMRC's website. Mr Welland's point is that he did not consult the website and considered that HMRC should have done more to publicise the change. I will revert to this point later.

The law

16. In 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, referred to as '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).

17. The 'NRCGT' stands for non-resident capital gains tax. As is apparent from the first subsection of s 12ZB, the new NRCGT return only has to be filed where 'a non-resident CGT disposal' is made.

What is a non-resident CGT disposal?

18. A non-resident CGT disposal is defined in s 14B and s 12Z of TMA (see interpretations in s 12ZA TMA). S 14B provides that a non-resident disposal occurs (amongst other things) when a person who is not resident in the UK for the tax year of disposal, disposes of a residential property interest in the UK.

19. That phrase in turn is defined in Sch B1 of TCGA and in general refers to land on which a dwelling stands; 'dwelling' in turn has a rather long definition which, in brief summary, excludes institutional residential properties (eg boarding schools).

20. The residence status of a person is dealt with in s 12ZJ. That provides that the non-residence condition is met if at time of completion it is uncertain whether a person is non-resident but 'reasonable to expect that that condition will be met'. It also provides that in cases where it was not reasonable to expect that condition to be met, but it later becomes certain the person was non-resident then the NRCGT must be filed 30 days after the date of that certainty.

Other preconditions to liability

21. S 12ZBA provides that NRGT returns do not have to be made in certain circumstances, including where the 'no gain/no loss provisions' apply. That term is defined in s 288(3A) of TCGA. That section contains a long list of statutory provisions that deem certain disposals to take place as if they resulted in no gain or loss (for instance, an inter-spouse transfer).

22. In summary, s 12ZBA provides that NRCGT returns do not normally have to be made whether the transfer is exempt from CGT. But unless it is such an exempt

transfer, NRCGT returns do have to be made in cases there is simply no gain, or where the gain is so small there is no tax liability.

23. S 12ZC permits a single return to be made if two properties are disposed of in the same tax year if both completions occur on the same day.

Proof of liability

24. It is well established that in an appeal against a penalty, HMRC have the burden of proving that the penalty was properly imposed. But what does this mean in the case of an NRCGT return? In general terms, it means that HMRC have to prove that (a) the taxpayer was liable to make the NRCGT return by a particular date and (b) that the taxpayer failed to make the return by the relevant date.

25. As can be seen from above, there are a large number of preconditions to be met before it can be established that an NRCGT return was due on a particular date. In particular:

(a) The properties must be located in the UK;

(b) The properties sold must have been 'residential' as defined;

(c) The vendor must have been non-resident within the meaning of the NRCGT provisions;

(d) the disposal must not have been a 'no gain/no loss disposal' as defined;

(e) The disposal must have occurred on or after 6 April 2015.

26. HMRC only address some of these matters in their statement of case: they state Mr Welland accepts he has been non-resident since 2006. From their addresses, it is obvious that the properties are within the UK. Some of the other preconditions (such as the date of disposal, whether the properties were residential and whether a 'no gain/no loss' exemption applied) were not addressed. Mr Welland, in his replies, also makes the same assumption: he refers to the 'required' NRCGT return but does not explain why he considered he was obliged to file the return.

27. What does this mean for the appeal? The question of what HMRC must actually prove in an appeal where a point has not been expressly put in issue was considered in the binding decision of the Upper Tribunal in the case of *Burgess and Brimheath* [2015] UKUT 578 (TCC). The Upper Tribunal did not require the FTT to make a finding on every building block that leads to liability [36]; nevertheless, they did indicate that the appellant's 'silence' on an issue which HMRC has to prove could not be taken as acceptance that that issue was proved [44]. Acceptance that an issue was proved could be inferred [49] but not, it seems, from silence.

> [36] The scope of an appeal, and the issues that fall to be determined by the FTT, must be established by reference to all the circumstances. Those circumstances will include, in our view, the legislative

> framework, the burden of proof in relation to relevant issues and the way in which the respective cases of the parties have been put.
>
> ...
>
> [44] ... Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove.
>
> ...
>
> [48] ... Those issues were issues with respect to which HMRC had the burden of proof, and which, for HMRC to succeed, had to form part of HMRC's own case. They were not issues that the appellants had to raise or argue, and cannot therefore be regarded as points not taken by the appellants before the FTT
>
> [49] .... There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the [issues in that case], meant that those issues, on which HMRC's case depended, did not have to be determined in their favour. .....

What can the Tribunal infer the appellant has accepted?

28. In this appeal, the appellant has clearly accepted HMRC's case that he was non-resident: he refers to himself as non-resident; he accepted HMRC's summary of the facts in their statement of case which included his non-resident status.

29. He has clearly also accepted HMRC's case that he completed the sale of the three properties on the dates on which HMRC say that he did; in any event, as the Tribunal has copies of the NRCGT returns, it has undisputed evidence that this was so.

30. HMRC do not address the date of <u>disposal</u> of the properties and Mr Welland does not do so either. For CGT purposes (see s 28 TCGA) the normal date of disposal is the date of the <u>contract</u>. The date of disposal is relevant because it is only if it fell in tax year 15/16 that Mr Welland was liable to make a NRCGT return. Had the date of the contract been in tax year14/15 (ie on or before 5 April 2015) then Mr Welland would have had no liability to make an NRCGT return.

Undisputed evidence of date of disposal

31. In a different context, discussed below, Mr Welland referred me to the case of *McGreevy* [2017] UKFTT 690 (TC). There was a finding in that case that the appellant was not in breach of the NRCGT filing obligation as HMRC had failed to prove that a disposal had taken place in the relevant year (15/16) and therefore failed to prove that there was any liability to make a NRCGT return in respect of that property.

32. In that case, similarly to the three returns in this case, the taxpayer had completed her NRCGT return showing a disposal date as identical to the completion date. The Tribunal in *McGreevy* did not accept that this evidence proved the date of disposal. It seems that the Tribunal made two assumptions in rejecting the evidence on the face of the NRCGT returns. The first was the assumption that the taxpayer, unfamiliar with the TCGA which treats exchange of contract as the disposal, had mistakenly entered the completion date as the disposal date. The second assumption was that simultaneous exchange and completion was extremely unusual. The Tribunal found that the date of disposal was therefore not proved to have been in tax year 15/16 and allowed the appeal.

33. Mr Welland does not suggest that I follow this ruling. And I do not do so because, with respect to that Tribunal, I think that it made an error of law in its analysis.

34. In my view, in this case (and it seems in the *McGreevy* case) the NRCGT returns contained the only evidence before the Tribunal of the date of disposals of the properties. Neither party has suggested that the returns were incorrect. The evidence shown on the face of the returns is therefore not in dispute.

35. Even if it were improbable that simultaneous exchange and completion took place, and even if it were probable that a taxpayer would not realise the date of the contract was the date of disposal, a Tribunal, as a matter of law, cannot reject unchallenged evidence that is not in dispute where there is no other evidence that puts it in doubt. It certainly cannot reject such evidence merely on the basis of assumptions. (In any event, at least one of the assumptions appears erroneous as simultaneous exchange and completion is not unusual, particularly when (as in these cases) the vendor was not in occupation of the property.)

36. So I find, on the basis of the undisputed evidence in front of this Tribunal, that that the three disposals did take place in the 15/16 tax year.

37. The dates of the NRCGT returns also show that Mr Welland (as he accepts) failed to make a NRCGT return within 30 days of completion of the sale on these properties; indeed they show that he failed to make such returns for over a year in respect of the first two sales, and for over six months in the case of the last of the three disposals.

Matters on which there is no evidence

38. That deals with the pre-condition that the date of the disposal must be proved to have been on or after 6 April 2015. But there are some pre-conditions to liability to file an NRCGT return on which I have no evidence. There is no evidence that:

(a) the properties were residential and HMRC do not refer to this issue in their statement of case;

(b) the sales were not exempt as 'no gain/no loss' and HMRC do not refer to this issue in their statement of case.

So applying *Burgess and Brimheath*, the question is whether I ought to infer that the appellant accepted he was liable to make a NRCGT return and decide the point was not in issue, or alternatively, because there is no proof of these aspects of liability, I should allow the appeal.

39. This seems to me to be a case like *English Holdings* [2016] UKFTT 436 (TC) at §64 where the appellant has conceded his late filing; Mr Welland impliedly accepts that he was liable to file the NRCGT return. Indeed, he refers to himself as 'required' to file the NRCGT returns.

40. In these circumstances, because 'the way in which the respective cases of the parties have been put' ([36] of *Brimheath)* is that the appellant has accepted he was liable to file the NRCGT returns and failed to do so on time, I do not consider that HMRC do have to prove every pre-condition for liability to file an NRCGT return.

41. Therefore, their failure to prove that the properties were residential, and that the disposal was not 'no gain/no loss' does not matter. My finding is that they do not have to prove this as the appellant has accepted it. The finding is that the appellant was liable to make the NRCGT returns which he did make, albeit late. So the question for the appeal is whether or not the penalties imposed should be discharged.

The law on the penalties

42. The penalty for failing to make an NRCGT return is contained in the usual penalty legislation, Schedule 55 of the Finance Act 2009 ('FA 2009').

43. §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, an NRCGT return under s 12ZB of TMA 1970 was added to the schedule by Finance Act 2015 s 37 and Sch 7 §59.

44. §3 of Schedule 55 permits HMRC to impose a £100 penalty on a taxpayer if the return is late; §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; §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. As I have said, HMRC imposed those penalties in this case: Mr Welland was caught by the minimum £300 penalties as there was no tax owing. (There was no 12-months late penalty for the third property as the return was only just over 6 months late).

45. As I have said, HMRC have established that Mr Welland was in principle liable to these penalties because he accepted he was obliged to make the NRCGT returns; they have established that he did so late, although this was not in dispute either. So the question is whether the Tribunal should nevertheless discharge the penalties.

Grounds of appeal

46. In summary, the appellant's grounds of appeal were:

(1) He was not aware of the requirement to file NRCGT returns;

(2) HMRC failed to make him aware of the requirement to file NRCGT returns;

(3) The penalties were disproportionate because he owed no tax on the sales;

(4) HMRC have discharged penalties for other taxpayers in similar situations.

(5) Up until these penalties were imposed, he had a good tax compliance record.

47. Unlike HMRC, the Tribunal has no general discretion. It must uphold the penalties which were properly imposed unless there is a legal reason to discharge them. And in law the only grounds on which the penalties could be discharged (in whole or part) by the Tribunal are:

(a) Where the appellant had a reasonable excuse; or

(b) that (in some cases) there were 'special circumstances'; or

(c) because the penalties lacked proportionality.

So I will consider each of these matters in turn.

Reasonable excuse

48. The legislation on 'reasonable excuse' seems a little curious in that there are two potentially applicable provisions, which are not identical. As both appear to be applicable, it seems the taxpayer could rely on both. Firstly, there is s 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 §23 of FA 2009 which provides that where there is a reasonable excuse, although the return remains late, the penalty must be discharged.

49. The only differences between the two provisions is that the latter specifically refers to the extent to which insufficiency of funds and reliance on a third party could amount to a reasonable excuse, where the former provision is silent on this. While that might give rise to an issue in cases where such a reasonable excuse is put forward, it does not arise in this case where neither insufficiency of funds nor reliance on a third party is put forward as the reasonable excuse.

50. So I will consider only §23(1) as in practice it makes no difference whether I consider s 118 TMA or §23(1) Sch 55. And it 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.

51. As reasonable excuse is a defence, it is not for HMRC to prove that the appellant did not have a reasonable excuse. It is clear that the appellant must prove that he did have a reasonable excuse, and that he submitted the NRCGT returns without unreasonable delay after the excuse ceased. But before considering that, I consider what 'reasonable excuse' actually means as a matter of law.

What is an 'excuse'

52. Although §23 sets out what is *not* a reasonable excuse (insufficiency of funds and reliance on a third person, except in the specified circumstances), it does not set out what a reasonable excuse is.

53. Normal rules of statutory interpretation apply. Words should be given their literal meaning in so far as consistent with Parliament's discernible intent. And an 'excuse' for a default is something which is the exculpatory cause of the default. To state what should be obvious, something can only be a 'reasonable excuse' if it actually causes the default.

54. So it can be seen that the last three of these grounds of appeal put forward by the appellant cannot amount to a reasonable excuse. Even if the penalty of £1,800 is disproportionate to the tax at stake (£0), that did not *cause* the failure to file on time and cannot be a reasonable excuse for it; even if true that HMRC have discharged similar penalties on other taxpayers, that did not cause the failure to file on time and cannot be a reasonable excuse for it; even though his tax compliance record was previously exemplary, it did not cause the late compliance this time. Whether these grounds of appeal amount to special circumstances or can otherwise be taken into account in this appeal, they cannot be taken into account as a 'reasonable excuse'. So I will only consider the first two grounds of appeal under the heading of 'reasonable excuse'.

What is a 'reasonable excuse'

55. It must also be obvious that not every excuse is a reasonable excuse. So what did Parliament intend 'reasonable' to mean in these circumstances?

56. Most Tribunal decisions have agreed that the test is objective: so whether the taxpayer in default believed that what he was doing was reasonable is irrelevant. The test measures reasonableness by an external standard. And what is that external standard? The test stated in *The Clean Car Co Ltd* [1991] BVC 568 is often cited as being correct:

> 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?

What is much less rarely referred to is that in the next paragraph of that decision, the judge said that the 'age and experience' of the taxpayer would be relevant to his test, as well his health or some other difficulty. And the Judge allowed the appeal on the basis that the default occurred because the taxpayer was under strain due to daughter's illness and was unfamiliar with the relevant regulations and law.

57. Whether he was correct to do so is highly relevant here because Mr Welland's position is that he too was quite ignorant of his liability (in this case, to make an NRCGT return) and that he did make it very shortly after discovering his liability to do so.

58. I note that more recently some judges (including myself) have used a similar description of 'reasonable excuse' to that in *Clean Car Co* but without suggesting that the age and experience of the taxpayer could be relevant to an objective test. (It is accepted that physical and mental ill-health can be reasonable excuses, but as that is not relevant in this appeal, I discuss it no further).

59. I said in *Eralp* [2017] UKFTT 235 (TC) that a reasonable excuse was

> ....something which causes the failure to file and which could have caused a conscientious taxpayer, aware of his obligations to HMRC and intending to fulfil them, to fail to file the return.

60. Judge Berner in *Barrett* [2015] UKFTT 329 at [154] 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".

61. It seems to me that the question is whether or not ignorance of the law can be a reasonable excuse is what is in issue with these different formulations. When the Judge in *Clean Car Co* referred to the taxpayer's 'age and experience' as being relevant he was really referring to whether he considered the taxpayer's ignorance of his obligations to be excusable because he couldn't be expected to know them.

62. Firstly, I do not accept that a younger person (at least if an adult) can be excused not knowing his obligations just because of his youth and inexperience. And such a rule would not help Mr Welland who is a pensioner. The rules should be the same for all, however young or old.

63. Secondly, so far as the question whether inexperience can amount to a reasonable excuse, that seems to me to be the same question as whether ignorance of the law can be a reasonable excuse. Is it reasonable to be ignorant of the law, in the sense can it be an excuse for not doing what the law required to be done?

64. HMRC say it is not, and rely on what I said in *Qualapharm* [2016] UKFTT 100 (TC):

> §121 ....as a matter of policy such ignorance [of the law] cannot amount to a reasonable excuse. Ignorance of the law cannot be a reasonable excuse as that would result the law favouring persons who chose to remain in ignorance of the law over those who sought to know the law in order to obey it.

Ignorance of the law

65. The appellant in reply to HMRC relied on the case of *McGreevy* to which I have already referred. The Judge there considered whether ignorance of the law could be a reasonable excuse. He noted at §171 that there were many statements of that principle in cases in this Tribunal, but considered that the statement was limited to cases where the situation was 'commonplace' (§172) and that it was properly limited to criminal offences (§173). He went on to imply in §174 that it was unreasonable for an ordinary taxpayer to be expected to understand the legislation relating to NRCGT liability and returns. While it is not perhaps clearly stated, the Judge's conclusion at §183 that the appellant had a reasonable excuse seemed to be because he considered ignorance of the law *was* a reasonable excuse in circumstances where the Tribunal considered the legislation difficult to understand and HMRC's guidance on it difficult to locate.

66. The Judge was right to state that there have been very many cases in this Tribunal which have relied on the principle that ignorance of the law is not an excuse for failing to comply with it. I cannot cite them all. In some cases, it is a mere statement of the rule (eg Judge Anne Scott, *Aitkin* [2017] UKFTT 764 (TC) and Judge Poole, *Agar* [2011] UKFTT 773 (TC) but these are just two of many examples). In some of the cases, the Judge gives a reason for the existence of the rule, such as:

> 'It is clear that ignorance of the law, or a mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it. This is on the basis that a taxpayer should be sufficiently acquainted with the law and such knowledge is required to be accurate.' Judge Popplewell, *Baden Caunter* [2017] UKFTT 335 (TC)

> 'In the present case, it is argued that the Appellant was unaware of her obligation under tax law to return the additional payments and to pay tax on those additional payments. In effect, this is a plea of ignorance of the law. Consistently with what has been said above, the Tribunal considers that a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what are his or her tax obligations.' Judge Staker, *Julie Ashton* [2013] UKFTT 140 (TC)

> 'Otherwise, a mistake of law or ignorance of the law could constitute a reasonable excuse – a consequence which Parliament cannot possibly have intended.' Judge Brannan, *Stratton* [2012] UKFTT 578 (TC)

67. In summary, what these judges were saying is that Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed. That is at the root of what I said in *Qualapharm* too.

68. These are, however, merely decisions of this Tribunal. The Judge in *McGreevy* did not consider that he should follow these FTT decisions, and he was not bound to do so. I am similarly not bound by any of these decisions nor *McGreevy.* I have to consider the matter afresh.

Should the rule be limited to criminal cases?

69. In *McGreevy,* the Judge suggested that the principle was one limited to criminal cases. It is indeed a clear rule of law in criminal cases; see for instance the Court of Appeal decision in *Grant v Borg* [1982] 2 All ER 257. In that case it was said that the principle that ignorance of the law was no defence to a criminal charge was so fundamental that the word "knowingly" in a criminal statute could not be construed as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law. As put by the Court of Appeal in a later case:

> The [defendant] is to be judged on the facts as he believed them to be, but on the law as it is.

70. Is the principle limited to criminal cases? There is no obvious reason why it would not extend to cases concerning civil wrongdoing. Civil penalties are for wrongdoing, albeit wrongdoing which is not regarded as deserving of a criminal sanction. The more severe the wrongdoing, the more severe the punishment. Criminal misbehaviour risks a conviction, fine and sometimes imprisonment. Civil misbehaviour risks only a penalty. But largely it is a matter of degree: both types of sanction are intended to deter and punish. So it is not obvious why the principle that ignorance of the law is no excuse, so fundamental to criminal law, would not also apply to civil penalties.

71. And apart from the *McGreevy* case, there are a great many decisions in this Tribunal deciding that it does: I have cited only a few above. Moreover, the principle was cited and apparently approved by the Court of Appeal in a Financial Services Authority case *Scandex Capital Management* [1997] EWCA 3006 (civ), which concerned a civil and not criminal contravention.

72. Therefore, with respect to the Judge in *McGreevy,* I do not believe therefore that it is right to say that the principle does not apply in civil penalty cases. I think it does.

Is the rule absolute?

73. However, I agree with the Judge in *McGreevy* where he pointed out that some tribunals have considered the rule to be less than absolute. More significantly, there is

High Court authority that the rule is not absolute. Simon Brown J in the case of *Neal* [1988] STC 131 approved a Tribunal decision *Geary* (1987) VTD 2314 which had found ignorance of the law to be a reasonable excuse and said (at §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. ...

74. He indicated that the circumstances in which ignorance of the law might be a reasonable excuse was where the law was uncertain, such as

> 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.

75. In the particular case before him, where, due to ignorance of VAT law, the appellant had failed to register for VAT despite being registrable, the Judge ruled that it was ignorance of basic law and it could not amount to a reasonable excuse.

76. As he also said *Geary* was correctly decided, it is worth considering the facts of that case too. In that case the appellants had also failed to register for VAT; and it appears that the judge considered that while there was no excuse generally for not knowing of the obligation to register for VAT, there was a reasonable excuse in failing to understand that in their particular circumstances that they were obliged to register for VAT. That was because the distinction between self-employment and employment was complex and uncertain in their particular circumstances.

77. The decision in *Neal* suggests therefor 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.

How complex must the law be to amount to a reasonable excuse?

78. The recent Tribunal decision in *Hendrickson* [2017] UKFTT 563 (TC) was cited in *McGreevy* as saying that ignorance of the law could be a reasonable excuse although, in fact, it left that open (§47). What it did say was that ignorance of the law was not a reasonable excuse on the particular facts of the case. There the trader wrongly assumed all protective clothing was zero rated. The Tribunal found that he could have checked the position with HMRC and the Tribunal found it unreasonable that he had not.

79. In *Scurfield* [2011] UKFTT 532 (TC) the dispute was over whether the Appellant had a reasonable excuse for not giving a certain notification to HMRC to protect certain pension rights by the closing date of the 5 April 2009. The appellant was ignorant of the law and the need to protect his pension in this way.

80. The Tribunal appears to have concluded that the new law relating to pensions and lifetime allowances was not particularly complex, the appellant was aware of it in general terms, and from what information was published on HMRC's website the

appellant could have discovered the need to notify. Therefore, it concluded that the appellant did not have a reasonable excuse for failing to make the notification.

81. And in *McGreevy* the Judge considered that the NRCGT provisions were sufficiently complex for ignorance of them to be a reasonable excuse. I will revert to this point but first mention one other tribunal case which found ignorance of the law to be a reasonable excuse.

Misinformation

82. *Cabling Utilities Ltd* [2011] UKFTT 224 (TC) was a case in which ignorance of the law was said to be a reasonable excuse. In that appeal, Judge Brooks also adopted a nuanced approach to the rule and appeared to say that ignorance of basic or primary law would not amount to a reasonable excuse, while ignorance of complex law might amount to a reasonable excuse. He went on to find that there was a reasonable excuse in that case, but that seems to have been, not because the law was complex, but because HMRC had effectively misled the taxpayer after he had approached them for advice.

83. Properly understood, therefore, *Cabling Utilities* is not a case about ignorance of the law at all, but another fundamental principle that where a person acts on the advice of HMRC, HMRC cannot then penalise them if they get it wrong. I applied a similar approach, for instance, in the case of *B & J Shopfitting Services* [2010] UKFTT 78 (TC)

> [15]I agreed that ignorance of the law is not by itself a reasonable excuse. As a matter of policy not knowing the law cannot be a reasonable excuse for not complying with it. If ignorance of the law were a reasonable excuse it would encourage taxpayers to ignore the law and penalise those who attempt but fail to fully comply with it. But here the agent was not relying on his ignorance of the law but on his mistaken reliance on HMRC's misleading guidance on the law. In general, being misinformed about the law by another person will not be a reasonable excuse: as I have already said it is not a reasonable excuse for a taxpayer to rely on a third party to discharge his obligations.
>
> [16.] However, where it is HMRC who has mis-stated the law, it seems to me that this is quite a different matter. HMRC has responsibility for gathering the correct amount of tax and it must be reasonable for a taxpayer to rely on HMRC's guidance as a correct statement of the law. Further, it is actually HMRC who impose the penalty: HMRC must therefore ensure that they do not mislead taxpayers into mistaken actions which incur a penalty.

Is ignorance of the law a reasonable excuse in tax penalty cases?

84. Where does this leave the question of whether ignorance of the law can in principle amount to a reasonable excuse in a tax penalty case?

85. It's not entirely clear whether the *Neal* case is binding on this Tribunal: it is a High Court decision but the later Court of Appeal decision in *Scandex* referred to the bar on ignorance of the law being an excuse for non-compliance without suggesting there was a qualification on it in cases concerning complex or uncertain law.

86. Indeed, it is not obvious to me why there should be such a qualification. If Parliament enacts complex tax law, it must nevertheless expect it to be obeyed as much as simple tax law: so complexity alone should not amount to a good reason for non-compliance. And where the law is of such complexity that it is uncertain whether or not it applies to the person concerned, Parliament can't be supposed to intend that the law is ignored. That person ought to make enquiries of HMRC: if that person then follows HMRC's advice but that advice is wrong, that should be a reasonable excuse (see *Cabling Utlilties* and *B&J Shopfitting)*; where the advice is right but the person does not follow it, that should not be a reasonable excuse. If the taxpayer simply ignores the uncertainty, it is difficult to see why that would be a reasonable excuse.

87. The obvious point is that 'reasonable excuse' has to be interpreted with Parliament's intention in mind; and Parliament, while it certainly has enacted 1,000s of pages of tax legislation, nevertheless must have intended *all* of it to be obeyed.

88. Secondly, even assuming that *Neal* is still good and binding law on this Tribunal, I think (for the above reasons) that the exception 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.)

89. 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.

Application to facts in this case

90. There was no suggestion that the law in this case was uncertain in its application to Mr Welland. He does not suggest that the law was complex either, although it appears that the judge in *McGreevy* considered that it was.

91. In any event, the exception recognised in *Neal* does not apply here because there is no suggestion that it was either the uncertainty or the complexity of the filing requirements which caused Mr Welland to file his NRCGT returns late. On the contrary, Mr Welland had no difficulty, once aware of the obligation from reading his SA return paperwork, in concluding that he was liable to file an NRCGT return.

92. So the reason he did not file his NRCGT returns on time was that he was simply not aware of the requirement. He knew he had to report the sale of the properties and (wrongly) assumed it was enough to do so on his normal SA return. The *Neal* exception for complex, uncertain law is therefore irrelevant because Mr Welland had made no failed attempt to understand complex or uncertain law: he simply made an assumption and did not investigate the position at all.

93. I am aware that the tribunal in *McGreevy* considered that the law relating to NRCGT filing was complex (see §§174-178) and that was one of the reasons it found that there was a reasonable excuse (§183). But its reasoning appears flawed because there is no finding that that the complexity or uncertainty of the law was the *reason* for the late filing. There, as here, the reason for the late filing seems to have been simple ignorance of the law.

94. In any event, I do not agree with *McGreevy* that the law requiring non-residents to make returns within 30 days of sale to be so complex that they cannot be expected to understand it. While the statutory legislation as explained at §§16-23 above is not completely straightforward, it is not particularly complex either, and the appellants (had they known about it) could have rung HMRC's helpline, consulted HMRC's website, or taken professional advice if they did not understand it.

95. 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.

96. The appellant's ignorance of his liability to make NRCGT returns cannot amount to a reasonable excuse. It was the cause of his failure to make timely returns, but it does not excuse his failure. The law was not complex nor uncertain, nor was any complexity or uncertainty in the law the reason for Mr Welland's failure to file on time. He didn't file on time simply because he was unaware of the obligation to do so. He assumed (wrongly) he knew what the reporting requirements were and he did not check. Such ignorance of basic law is not a reasonable excuse.

HMRC's failure to more widely publicise the change in law

97. Mr Welland's complaint is that he considers that HMRC should have told him of the change in law. He says they ought to have known from his previous tax returns that he was a non-resident landlord, and that therefore he might one day sell his UK properties and be liable to make a NRCGT return. He says that HMRC could have written to him to warn him of the new filing obligation.

98. He relies on *McGreevy* as demonstrating that HMRC's failure to more widely publicise a change in the law can amount to a reasonable excuse. At §180-183 of that case it seems it was HMRC's failure to send a letter explaining the changes to all non-resident landlords who declared rental income on their SA returns which led at least in part to the decision at §183 that the appellant had a reasonable excuse: in other

words, because HMRC did not tell her about the change in the law, the Tribunal found she had a reasonable excuse for not complying with it.

99. Mr Welland considers that that decision was right and that for the same reason the penalties in his appeal should be discharged.

100. I am unable, with respect, to agree with the *McGreevy* case on this. As I said at §§52-54 above, for anything to be a reasonable excuse for a failure, it must cause the failure. HMRC's failure to tell Mr Welland about the change in the law did not cause his ignorance: it merely failed to change it. Mr Welland was ignorant of the new filing requirement: HMRC did not write to tell him about it so he remained ignorant of it long after the due dates had passed. The failure to write to him did not cause his ignorance and so it could not in law be an excuse for it.

101. In other words, this ground of appeal is identical to the former ground of appeal. Mr Welland is really saying that he was ignorant of the law and that amounts to a reasonable excuse. I have already said that it does not because the law was not complex and uncertain nor was any complexity or uncertainty in the law the cause of his failure to file. He didn't file the NRCGT returns on the due date because at the time he didn't know that he was required to file such a return within 30 days of completion. It was simple ignorance of a relatively simple filing obligation.

Another exception to the rule?

102. But there is another way of looking at this ground of appeal. The cause of the failure to file on time was ignorance of the law. HMRC did not cause that ignorance, but should such ignorance of the law amount to a reasonable excuse where HMRC failed to remedy the ignorance, particularly if it failed to remedy the ignorance in breach of its duty to inform taxpayers of the law? In other words, should 'reasonable excuse' be so interpreted because Parliament should be presumed to intend that HMRC should inform taxpayers of changes in the law?

103. So far as I can see there is no authority for this view: *Neal* is not authority for such a proposition. It is only authority for the proposition that ignorance of the law may be a reasonable excuse where the law is complex and uncertain. Nevertheless, the point was not at issue in *Neal* and I need to consider whether *McGreevy* might be right.

HMRC's obligations

104. Whether or not HMRC is in breach of its public law duties is not normally something which this Tribunal is allowed to consider. For instance, the Upper Tribunal in the case of *Hok* [2012] UKUT (TCC), a case concerning HMRC's failure to give a timely reminder to a taxpayer of its liability to make returns, ruled that the Tribunal had no jurisdiction to quash penalties in circumstances where the Tribunal considered HMRC was to blame for failing to give a timely reminder. Only the Administrative division of the High Court has power to take public bodies to task for

breach of their duties (in actions known as 'judicial reviews') and permission has to be sought from the court before such actions can commence.

105. Nevertheless, this Tribunal has a wide jurisdiction when considering 'reasonable excuse' and a breach by HMRC of its public law obligations could be relevant to whether there is a reasonable excuse. So the question is what Parliament intended by the words 'reasonable excuse' and whether they were intended to emcompass a situation where the appellant was ignorant of the law in circumstances where, as in this case, HMRC had published the change on its website but done nothing specific to draw it to the appellants' attention.

106. The Tribunal in *McGreevy* clearly (if implicitly) considered that HMRC had a duty as a tax gathering public body to publicise changes to the law and in particular to publicise the introduction of new reporting requirements. That must be right. The Tribunal also considered that HMRC was in breach of that duty by doing no more than putting the new reporting requirement somewhere on their website but not really doing anything else to draw it to anyone's attention. Whether that is right is rather more debateable.

107. Tax law as a whole is enormously voluminous and changes very regularly. It must be impossible for HMRC to identify and notify every possibly affected taxpayer of every possibly relevant change in the law and if they were to attempt to do so, one can imagine few taxpayers would read the mountain of letters sent to them by HMRC on a regular basis. Mr Welland does not of course suggest that every potentially affected taxpayer is notified of every potentially relevant change in the law: he simply says HMRC should have informed all non-resident landlords of the new NRCGT filing requirement as they were an identifiable group of people who would be affected by the change in law as and when they sold their UK property.

108. But it can't be looked at as a one off: if HMRC were obliged to warn non-resident landlords of this change, it would follow that HMRC have an obligation to individually warn all potentially affected taxpayers (who can be identified) of all potentially relevant changes. Yet Parliament cannot have intended to give HMRC such an onerous (not to mention expensive) duty. On the contrary, Parliament must expect citizens to be proactive in taking responsibility for ensuring they obey the law: otherwise few laws would be obeyed. So while HMRC might have a legal duty to publish significant changes on their website, I do not think it was actually *unlawful* for HMRC to fail to write to all non-resident landlords individually. Therefore, I do not consider that HMRC were in breach of any duty in failing to write to Mr Welland to warn him of the new NRCGT reporting requirement.

109. And once I have reached the conclusion that HMRC acted lawfully, then it is apparent that there is nothing in the point that Mr Welland raises. It amounts to saying that a taxpayer had a reasonable excuse where ignorant of its obligations, unless HMRC had specifically drawn the obligation to the attention of the taxpayer. On the contrary, Parliament must have intended taxpayers to take positive actions to acquaint themselves with their obligations.

110. So while I accept it is possible that if HMRC had acted unlawfully in failing to write to Mr Welland then his ignorance of the law might be a reasonable excuse, I do not accept that HMRC did act unlawfully in failing to write to him about the changes. And therefore his ignorance of the law is not a reasonable excuse. I do not consider that *McGreevy* was correctly decided on this point and I cannot follow it.

111. I note that other Tribunal decisions also suggest that *McGreevy* was wrongly decided; for instance, there was no suggestion in *Scurfield* that HMRC ought to have written to all potentially affected taxpayers and that a failure to do so would make ignorance of the law a reasonable excuse. And in *Dina Foods Ltd* [2011] UKFTT 709 (TC)) Judge Berner said that:

> "[20] …..
>
> (4) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances."

Conclusion on the test for reasonable excuse

112. I started this section of my decision with consideration of tests which various tribunals have put forward for 'reasonable excuse' and in particular the one in *Clean Car Co*, so often relied on in this Tribunal.

113. My conclusion is that it is largely right: the appellant's actions are to be judged objectively by comparing them to the possible actions of a hypothetical taxpayer who is conscious of, and intends to comply with, his tax obligations. That hypothetical taxpayer is put into the same scenario as the appellant, and is endowed with the appellant's actual physical and mental health. But (contrary to what was said in *Clean Car Co)* I do not think that the taxpayer's age (if adult) and actual experience can amount to a reasonable excuse. Ignorance of the law is no excuse save possibly, (if *Neal* is still binding) in circumstances where the complexity and uncertainty of the relevant law caused the failure to comply. And what HMRC said or did not say is irrelevant to reasonable excuse unless it misled the appellant.

114. Applying that, the appellant's ignorance that his property sales had to be declared 30 days after completion rather than in his SA return was not a reasonable excuse; compliance with a filing obligation is basic law and in any event his ignorance arose from his failure to investigate the matter rather than because the law was difficult or uncertain. While it must be true to say that HMRC could have done more to alert potential defaulters to the need to file NRCGT returns, their failure to do so is not a reasonable excuse; it did not cause the failure to file on time and, further, Parliament cannot have intended the legislation to be read in that manner.

115. I have considered the meaning of 'reasonable excuse' in much greater detail (and unfortunately length) than most penalty decisions. I have done so because Mr Welland specifically relied on the *McGreevy* decision; as I do not consider that the *McGreevy* decision was correct I felt it necessary to consider the issues it raised in detail and explain why I do not follow it.

116. I can anticipate that Mr Welland will feel it unfair that a taxpayer whose defence was largely identical to his should in *McGreevy* have been excused her default but I have not been able to come to the same conclusion on his appeal. The legal position is that first instance Tribunals are not obliged to follow other decisions of the same Tribunal where we consider that the earlier decision was wrong: I do consider it was wrong and in conscience cannot follow it.

117. My decision can be appealed and it would be advantageous if the Upper Tribunal were to make a binding ruling on the matter of when ignorance of the law can be a reasonable excuse, so that future inconsistent first tier decisions on this matter are avoided. However, if Mr Welland wishes to appeal my decision, he must be aware that the Upper Tribunal can award costs as it sees fit although (if an application is made at the outset) might order that an appeal be heard without an award of costs.

Special circumstances

118. Apart from reasonable excuse, another ground on which an appeal against a Sch 55 penalty can be allowed in some cases is 'special circumstances'. So I will consider whether any of the five grounds put forward by Mr Welland could be 'special circumstances'.

119. Sch 55 of the FA 2009 gives, in the first instance, HMRC power to reduce penalties for special circumstances, although in Mr Welland's case, HMRC has made no reduction for special circumstances. The relevant part of Sch 55 reads as follows:

> **Special reduction**
>
> 16(1) if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> 16(2) In sub-paragraph (1) special circumstances does not include –
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> 16(3) In subparagraph (1) the reference to reducing a penalty includes a reference to
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

120. Then §22(3) of Sch 55 provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of special circumstances was 'flawed', in the sense that HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision; a decision by HMRC is also 'flawed' in this sense if HMRC simply failed to think about the matter at all.

Was HMRC's decision on special circumstances flawed?

121. So in order to decide if I can consider special circumstances, I have to first decide whether HMRC's decision on special circumstances was flawed. As I find that neither HMRC's original imposition of the penalties nor the review of the penalties (dated 13 February 2017) considered whether to reduce or cancel the penalties due to special circumstances, I find their decision was flawed because they simply failed to think about special circumstances at all. I note that HMRC accept that this was the position in their statement of case and that, therefore, the failure to consider special circumstances renders HMRC's decision 'flawed'. That means, as HMRC accepts, this Tribunal can consider whether to mitigate the penalties on the basis of special circumstances.

122. Nevertheless, HMRC suggest that there are no special circumstances and the Tribunal should not mitigate the penalties. In order to make a decision on this, I must consider what the legislation means by 'special circumstances'.

123. There is no test in the legislation but various Tribunals have attempted to give a definition. They often start with what the Court of Appeal (in a different context) said in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H that:

> "…to be special the event must be something out of the ordinary, something uncommon; …"

124. In *Warren* [2012] UKFTT 57 (TC) the Tribunal said of "special circumstances":

> "[53.] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.
>
> [54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

125. What was said in *Warren* seems right, if very general. I will consider whether any of the grounds put forward by the appellant could amount to special circumstances. In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.

Ignorance of the law and HMRC's failure to remedy such ignorance

126. There have been a number of cases (such as *Algarve* [2012] UKFTT 463 (TC)) where the Tribunal rejected as special circumstances the fact that the taxpayers were aware of their filing obligations but unaware that changes in the penalty regime meant that the penalties for failing to file were much increased.

127. In *Dina Foods Ltd* [2011] UKFTT 709 (TC)) Judge Berner said that:

> "[20] …..
>
> (3) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC;
>
> (4) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances."

128. I do not think that the position is any different where the ignorance of the law was ignorance of the obligation to file: and that is for all the same reasons as explained with respect to 'reasonable excuse' and set out at §§65-95

129. Similarly where HMRC have failed to draw to the taxpayer's attention the change in the law I do not consider that it can amount to special circumstances for the reasons as set out above at §§96-116.

Other taxpayers have been let off

130. Mr Welland certainly has evidence that other taxpayers have been let off penalties. He made a freedom of information request and learnt that as at 31 January 2017 20,264 NRCGT returns were made, of which 7,356 were late and in respect of 4,022 of them penalties for late filing were imposed. The tax shown on the returns amounted to just over £7.5million and the penalties charged to just under £3.5 million.

131. However, this does not tell me <u>why</u> these taxpayers who made late returns who were not charged a penalty were let off. They may have had valid reasonable excuses. I have no way of telling. So as a matter of evidence, he has not satisfied me that taxpayers in identical circumstances have been treated differently by HMRC. Has he has not proved this, it cannot be a special circumstance, even if in law it could be if proved, an issue which I do not need therefore to decide.

The tax at stake was nil

132. I will consider proportionality separately, but is it possible for the fact that the tax at stake was nil to mean that there are 'special circumstances'? Firstly, it is not an unusual circumstance: returns often have to be made where the tax is nil.

133. Moreover, I do not think Parliament intended it to be a special circumstance justifying reduction in a penalty for non-filing. If Parliament had intended that there would be an excuse for not filing a return where the tax was nil, it would simply have required that returns did not have to be made unless there was a tax liability. But as is clear from the legislation, Parliament did not do this. It wanted the returns to be made even where the tax liability was nil: presumably it wanted HMRC to be able to verify that no tax was owing. So the fact that no tax was owed by Mr Welland is not a special circumstance.

Exemplary tax compliance record

134. An exemplary tax compliance record should not be unusual or special: on the contrary, it should be the norm. By itself, a previously exemplary tax compliance record cannot amount to special circumstances such that liability to a penalty for less than exemplary compliance should be excused in whole or part.

Three penalties in a row

135. Although Mr Welland did not raise this as a ground of appeal, it is obvious that the penalties amount to £1,800 because he sold three properties in one tax year: had he sold two of the properties in a later tax year he would no doubt have learned from bitter experience that an NRCGT return had to made 30 days after completion. Mr Welland was unable to learn from his mistakes, as he was late filing all three returns before he learned of his filing obligation.

136. Does the fact Mr Welland sold three properties in one tax year amount to special circumstances?

137. Taking into account the principles explained in *Warren,* I find that the circumstances are unusual but not unique. Can it be said it is significantly unfair for Mr Welland to bear the whole penalty? A taxpayer selling a single valuable property who failed to make the return would be penalised once; Mr Welland, selling three not so valuable properties, was penalised three times. And it is clear he did learn from his mistakes: he filed as soon as he realised his mistake and avoided the 12 months penalty on the last of the three sales.

138. I think that does amount to special circumstances, particularly in circumstances (which is not in dispute) where the taxpayer has previously had a good compliance record. Parliament, while intending to penalise non compliance, must have intended taxpayers to learn from their non-compliance. Because of the three sales in quick suceession, Mr Welland was unable to do so. I consider that the penalties should be reduced so that only the penalty on the first sale in tax year 15/16 should be payable. In other words, I reduce the penalty to £700.

Proportionality

139. The reason why the Tribunal is said to have the power to consider the proportionality of penalties is that taxpayers are given the right to protection of their

property, and can only be deprived of it (such as by a penalty) that is proportionate. What that means was explained in *International Transport Roth* [2002] EWCA Civ 158 where it was said that to lack proportionality a penalty must be 'not merely harsh but plainly unfair'

140. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC). The cases indicate that the penalty legislation as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate, without the entire scheme of the legislation being disproportionate. As Mr Welland isn't particularly clear which type of lack of proportionality he is alleging, I consider both.

The scheme as a whole

141. My inference is that Mr Welland's complaint is that because (he says) HMRC did not do enough to publicise the new filing requirements, many taxpayers were likely to fail to file on time.

142. As I have said, he made a freedom of information request and discovered from the reply that of the NRCGT returns submitted to the date of his request, some one third were submitted late. Of the late returns, over one third had no penalty imposed (or had the penalty withdrawn). The value of the penalties charged was only slightly less than half of the amount of tax shown as owing by the returns.

143. These figures do not, in my view, show that the tax was disproportionate. While it is Mr Welland's case that HMRC ought to have done more to publicise the imposition of this tax, these figures fall far short of being proof that the penalties were not there to penalise so much as (as Mr Welland seems to imply) to raise revenue.

144. Mr Welland suggests no other ground on which the system of penalties as a whole might be seen as disproportionate and (with the possible exception of the daily penalties, which are not relevant here) I am not aware of anything. The system may be harsh: but because the penalties are graduated and may be relieved where there is a reasonable excuse or special circumstances, the scheme of the legislation is not plainly unfair.

The penalties in this particular case

145. In this case, no tax is payable, yet Mr Welland has been penalised with flat rate penalties amounting to £700 (or £1,800 before the reduction in the last section). He says this is disproportionate.

146. I am unable to agree. It is not 'plainly unfair' that HMRC demand returns where no tax is due: HMRC must have the right to demand tax returns so that they can check whether any tax is due. And in order to make the demand for returns effective even though the returns may show that no tax is due, there has to be a penalty for failing to provide the return. Penalties for failure to submit a return where

no tax is due of £100, followed by two subsequent £300 penalties if the return is outstanding for 6 and then 12 months is not, on any view, plainly unfair.

147. I dismiss Mr Welland's case that the penalties imposed on him lacked proportionality.

Conclusion

148. For the reasons given in §§135-138, I allow the appeal to the extent of £1,100 of penalties on the last two sales but (for all the other reasons given) confirm the penalties amounting to £700 on the first sale.

149. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 13 DECEMBER 2017