



TC06516

Appeal number: TC/2017/08007

Capital Gains Tax – penalties – late filing of non-resident capital gains tax returns – whether reasonable excuse – whether ignorance of law an excuse – no – McGreevy distinguished – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MEI CHUN WONG

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 16 May 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 1 December 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 January 2018 and the Appellant's Reply dated 9 February 2018.

DECISION

Introduction

- 5 1. The appellant, Dr Wong, appeals against penalties for the late submission of a non-resident capital gains tax return (“NRCGT return”) charged under Schedule 55 Finance Act 2009 (“Schedule 55”) for the tax year ended 5 April 2016.
2. The penalties are as follows:-

Penalty	£
Late filing penalty (Schedule 55, paragraph 3)	100
6 month late filing penalty (Schedule 55, paragraph 5)	300
Total	400

10 The Facts

3. The facts are straightforward and are apparently not in dispute.
4. Dr Wong was, and is, non-resident and purchased an interest in a property in London in June 2011. The property was placed on the market in May 2014 and it was eventually sold at a loss in March 2016.
- 15 5. HMRC’s Statement of Case accepts that the date of the disposal for NRCGT purposes was 29 March 2016.
6. In accordance with Section 12ZB Taxes Management Act 1970 (“TMA”), the NRCGT return was required to be filed by no later than 28 April 2016.
- 20 7. It only became apparent to Dr Wong, when completing the self-assessment return for the 2015/16 tax year, that a NRCGT return should have been completed when the property was sold in September 2015. Up until that point Dr Wong was wholly unaware of the change in the law. The NRCGT return was immediately filed without delay on 12 January 2017, which was 260 days late.
- 25 8. Subsequently the penalty determinations set out at paragraph 2 above were issued to Dr Wong on 4 July 2017.
9. HMRC recognise that there was no liability to UK capital gains tax

The law

10. In relation to disposals made on or after 6 April 2015, Parliament introduced new sections into the TMA to make non-residents liable to make new returns, referred to as NRCGT returns. The legislation was contained in the Finance Act 2015.

5 11. With effect from 26 March 2015, a NRCGT return under Section 12ZB TMA was added to Schedule 55 by Finance Act 2015, section 37 and Schedule 7, paragraph 59. Paragraph 1(1) of Schedule 55 makes a person liable to a penalty if they fail to deliver a return of a type specified by the due date.

10 12. A failure to file the return on time engages the penalty regime in Schedule 55 (and references below to paragraphs are to paragraphs in that Schedule).

13. Penalties are calculated on the following basis:-

(a) Failure to file on time (ie the late filing penalty) - £100 (paragraph 3);

(b) Failure to file for 6 months (ie the 6 month penalty) – 5% of the payment due, or £300 (whichever is the greater) (paragraph 5); and

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

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

20 15. A taxpayer can appeal against any decision of HMRC that a penalty is payable and against any such decision as to the amount of the penalty (paragraph 20).

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

Special circumstances

25 17. If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

30 18. On an appeal to the Tribunal, the Tribunal can either confirm the same percentage reduction as HMRC have given for special circumstances or it can change that reduction if the Tribunal thinks that HMRC's original percentage reduction was flawed in the judicial review sense (paragraphs 22(3) and (4)).

Reasonable excuse

19. A taxpayer is not liable to pay a penalty if HMRC, or this Tribunal (on appeal) decides that (s)he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

20. However, both an insufficiency of funds, or reliance on another person, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Grounds of appeal

21. Essentially Dr Wong argues that there was a reasonable excuse for failing to file the NRCGT return on time. When Dr Wong bought the property, and when it was placed on the market, the new rules had not come into force. It was reasonable to assume that a return in the self-assessment annual return would suffice. That was the longstanding advice available from HMRC up until April 2015.

22. HMRC had failed to do enough to alert taxpayers to the impending changes in the legislation. The website was only revised in April 2015.

23. Dr Wong has been resident in Singapore for many years and is reliant on international news for developments in tax law in the UK.

24. Dr Wong relies on the decision in *McGreevy v HMRC*¹ which is predicated on a similar situation.

25. Dr Wong argues that it was wrong to impose a penalty particularly as no tax was payable and indeed the disposal had generated a loss, as was the case in *Saunders v HMRC*² (which I observe relied on *McGreevy*).

26. Neither Dr Wong's solicitor nor the sales agent had offered any advice about NRCGT and it transpired that neither had had any awareness of the new regime.

Discussion

27. What is a reasonable excuse? There is no statutory definition but it is well established law that the concept of "reasonable excuse" is an objective test applied to the circumstances of the individual payer. I agree with Judge Berner in *Barrett v HMRC*³ at paragraph 154 where he states:-

"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".

¹ 2017 UKFTT 690 (TC)

² 2017 UKFTT 765 (TC)

³ 2015 UKFTT 329

Can ignorance of the law be a reasonable excuse?

28. The issue here is whether Dr Wong’s lack of awareness of the need to file the NRCGT return could, of itself, constitute a reasonable excuse. In other words, can ignorance of the law in the sense of ignorance of an obligation imposed by the law, constitute a reasonable excuse?

29. As Dr Wong has pointed out there has been a divergence of view in this Tribunal. Not only in *McGreevy* but also in *Saunders* the Tribunal held that that lack of awareness did amount to a reasonable excuse.

30. By contrast Judge Mosedale, in both *Welland v HMRC*⁴ (“Welland”) and *Hesketh v HMRC*⁵ and Judge Brannan in *Hart v HMRC*⁶ (“Hart”) disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

31. These are all decisions of the First-tier Tribunal and therefore none of them are binding upon me.

32. As Judge Brannan points out in *Hart*, the Tribunals in *McGreevy* and *Saunders* decided that the principle that ignorance of the law provides no excuse was one that was confined to the criminal law and he and Judge Mosedale set out at considerable length the reasons why that is not so. I agree and gratefully adopt their reasoning.

33. I also agree with Judge Mosedale in *Qualapharm v HMRC*⁷, in another context, where she summarises the position as:

“... 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 choose to remain in ignorance of the law over those who sought to know the law in order to obey it”.

34. In summary, what judges in many, many cases have said 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.

35. I understand that Dr Wong will feel that it is unfair that the appeal of taxpayers whose defence was largely identical should succeed in *McGreevy* and *Saunders* and yet Dr Wong’s appeal has failed on the same issue. However, I am afraid that I agree with Judges Mosedale and Brannan that those appeals were wrongly decided and I simply cannot follow them.

36. Dr Wong’s absence from the UK cannot amount to a reasonable excuse. A UK national selling property in Singapore would be expected to ensure that s(he)

⁴ 2017 UKFTT 870 (TC)

⁵ 2017 UKFTT 871 (TC)

⁶ 2018 UKFTT 207 (TC)

⁷ 2016 UKFTT 100 (TC)

complied with all relevant local legislation and to take appropriate advice. It does not suffice to say that there was reliance on the international press. Dr Wong invested in property in the UK and must therefore comply with the relevant laws relating to it and its disposal.

5 37. I note the argument that neither of the advisors were aware of the change in the legislation. That is unfortunate. However, I agree with Judge Brannan in *Hart* at paragraph 77 where he states:

10 “As regards the solicitor, I do not think that there is any evidence that Mr Hart had engaged the solicitor to provide comprehensive tax advice in relation to the disposal of the Property. It is usual for a solicitor to advise in relation to stamp duty land tax returns, but I think it would be unusual for a conveyancing solicitor, unless explicitly instructed to do so, to advise more broadly on tax issues. On this basis, I do not think there are any grounds for concluding that Mr Hart could reasonably have been expected to receive advice from the solicitor in relation to the need to file a NRCGT return”.

15 38. The same argument would apply to the sales agent. Their ignorance does not amount to a reasonable excuse. HMRC did publicise the changes widely.

39. The fact that there was no tax due, and indeed a loss, cannot amount to a reasonable excuse since the objective of the legislation, and the penalties, is to ensure that returns are filed by a particular date imposed by statute. There are other penalties for failure to pay tax on time.

40. Whilst I sympathise with Dr Wong, I must conclude that lack of awareness of an obligation to file a NRCGT return was not a reasonable excuse.

Special circumstances

25 41. There is no statutory definition of “special circumstances”. As long ago as 1971, in a House of Lords decision dealing with “special circumstances” in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁸ said:

“Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

30 42. HMRC have confirmed that they did consider whether there should be a special reduction because of special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances. I have considered whether HMRC had acted in a way that no reasonable body could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. I think not. I have also considered whether

35 HMRC have erred on a point of law. They have not. I find no reason to disagree with their conclusion. HMRC’s decisions in that regard are not flawed when considered in light of the principles applicable in proceedings for judicial review.

⁸ 1971 3 All ER 967

43. For the avoidance of doubt, both whilst considering reasonable excuse and special circumstances, I had in mind Dr Wong’s argument that the penalty regime was not reasonable.

5 44. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Bosher*⁹ makes it clear that I do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

10 45. Lastly, the decision of the Upper Tribunal in *HMRC v Hok*¹⁰ is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

46. For all these reasons the appeal is dismissed and the penalties are confirmed.

15 47. 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.

25 **ANNE SCOTT**
TRIBUNAL JUDGE

RELEASE DATE: 30 MAY 2018

⁹ 2013 UKUT 579 (TCC)

¹⁰ 2012 UKUT 363