[2018] UKFTT 376 (TC)

TC06590

Appeal number: TC/2017/03621 and TC/2017/03619

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL PIDCOCK AND KAREN PIDCOCK **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 29 June 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notices of Appeal dated 11 May 2017 (with enclosures), HMRC's Statements of Case (with enclosures) dated 18 October 2017 and the Appellants' Replies dated 10 November 2017.

DECISION

Introduction

1. The appellants appeal against penalties for the late submission of non-resident capital gains tax ("NRCGT") returns charged under Schedule 55 Finance Act 2009 ("Schedule 55") for the tax year ended 5 April 2016. The penalties for each of them are as follows:-

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

2. In the first instance HMRC had also issued daily penalties in the sum of £900 but those have now been withdrawn.

The law

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

4. 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.

5. 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).

6. 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

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

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

8. 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).

9. 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

10. 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).

11. 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

12. 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)).

13. 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)).

The Facts

14. Mr and Mrs Pidcock are married and had lived in Oman from March 2008 until July 2016. They owned a property in the United Kingdom which they sold with completion on 27 July 2015. HMRC accept that the date of disposal for NRCGT purposes was that date. There is no tax payable.

15. The appellants only realised that NRCGT returns were required when they contacted HMRC by telephone in connection with their 2015/16 tax returns. They immediately filed the NRCGT returns on 15 May 2016.

Grounds of appeal

16. As the appellants were non-resident they did not know about all of the taxation changes over the years. They assumed that Capital Gains Tax would be covered in the next Self-Assessment tax returns.

17. Neither their estate agent nor their solicitors had mentioned the new legislation although both were aware that the appellants were non-resident.

18. HMRC should have advised all non-residents of the change in the law.

19. It is completely unfair that both of them should be penalised just because the property is jointly owned.

20. It is unfair that non-residents are treated in a different way to residents.

21. They have always been compliant with their tax obligations.

HMRC's case

22. HMRC contend that the returns should have been filed by no later than 26 August 2015. Self-assessment is based on voluntary compliance and it is incumbent on taxpayers to make sure that they have adequate procedures in place to meet their tax obligations. Information about Capital Gains Tax self-assessment and the completion of returns was within the public domain and widely available.

23. There is no statutory requirement for HMRC to issue reminders and notify customers of any update in the law.

24. The penalties are not disproportionate.

25. The question of "special circumstances" had been considered and did not apply.

Discussion

26. The Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok v HMRC*[1] at paragraph 36, it "… has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair". Accordingly, I cannot take into account their arguments that the penalties are unfair and discriminatory.

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 taxpayer. I agree with Judge Berner in *Barrett v HMRC*[2] 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] 2012 UKUT 363 (TCC)

[2] 2015 UKFTT 329

Can ignorance of the law be a reasonable excuse?

28. The issue here is whether the appellants 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. I do not agree with HMRC's unequivocal assertion that ignorance of the law cannot be a reasonable excuse. The Upper Tribunal in *Perrin v HMRC*[3] stated at paragraph 82:

> "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that 'ignorance of the law is no excuse', and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

30. The requirement to file a NRCGT return within 30 days of the disposal of a property is a simple and straightforward matter. Obviously, however, although the appellants did know that they should inform HMRC about the sale, the appellants did not know of the timing requirement. The information was however easily accessible. The appellants could have checked the website or telephoned HMRC when they decided to sell the property. They did not.

31. The appellants' absence from the UK cannot in itself amount to a reasonable excuse. In fact, not living in the UK should, if anything, impose a greater obligation to ensure that all necessary requirements were met timeously. A UK national selling property in, say, Singapore would be expected to ensure that s(he) complied with all relevant local legislation and to seek appropriate advice.

32. They chose to own this property in the UK and it appears that, when they decided to sell the property, they did not check what, if anything was required of them in terms of reporting the sale to HMRC. They assumed that their self-assessment returns would suffice. They do for income tax but not for NRCGT.

33. I note the argument that none of the advisors were aware of the change in the legislation. That is unfortunate. HMRC did publicise the changes very widely in the UK.

34. However, I agree with Judge Brannan in *Hart v HMRC*[4] at paragraph 77 where he states:

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[3] 2018 UKUT 156 (TC)

[4] 2018 UKFTT 207 (TC)

> "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".

35. The same argument would apply to the estate agent. Their ignorance does not amount to a reasonable excuse. It appears that the appellants did not consult a tax adviser.

36. I also agree with Judge Brannan in *Hart* at paragraph 73 where he agreed with Judge Mosedale that it was impractical for HMRC to attempt to communicate with every potentially affected non-resident taxpayer. They have no statutory obligation to do so.

37. The fact that there was no tax due, and indeed there was 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.

38. Whilst I sympathise with the appellants, they chose to invest in a property in the UK and they did not check their obligations in terms of the Tax Acts when they came to dispose of it. In most countries in the world, tax law changes on what can be an alarmingly regular basis. A prudent taxpayer would have checked. It was easy to check and, as the appellants state, they were able to file the return very shortly after having done so.

39. I conclude that lack of awareness of an obligation to file a NRCGT return was not a reasonable excuse.

Special circumstances

40. 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)*[5] said:

> "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

41. I agree with Judge Mosedale in *Hesketh v HMRC*[6] where she states at paragraph 127 that:

> "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

[5] 1971 3 All ER 967

[6] 2017 UKFTT 871

> or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions".

I agree with her when she goes on to find that ignorance of the obligation to file, HMRC's failure to draw the taxpayer's attention to the change in the law, the fact that other people have made the same mistake and the fact that the appellant in that case had an exemplary tax compliance record, as is the case in this appeal, do not amount to special circumstances. Lastly, the fact that the change came as an unexpected shock to Mr Nugent does not amount to special circumstances.

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 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.

43. For the avoidance of doubt, both whilst considering reasonable excuse and special circumstances, I had in mind their argument that the penalty regime was not reasonable or proportionate.

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.

45. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, I have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Bosher*[7], I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

46. Lastly, the decision of the Upper Tribunal in *HMRC v Hok*[8] 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.

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

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[7] 2013 UKUT 01479 (TCC)

[8] 2012 UKUT 363

48. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 09 JULY 2018