[2018] UKFTT 762 (TC)

TC06895

Appeal number: TC/2018/01532

CAPITAL GAINS TAX – penalties - late filing of non-resident capital gains tax returns – unaware of the reporting requirements - whether reasonable excuse - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

MILES GREEN	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 24 August 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 27 February 2018 (with enclosures) and HMRC's Statement of Case (with enclosures)] acknowledged by the Tribunal on 22 June 2018 and the Appellant's Reply dated 11 July 2018.

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DECISION

1. The appellant, Mr Green, 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 2017.

2. The penalties are as follows:

    (1) A late filing penalty of £100, imposed under paragraph 3, Schedule 55;

    (2) A six-month late filing penalty of £300, imposed under paragraph 5, Schedule 55.

Facts

3. The facts are straightforward and do not appear to be in dispute:

    (1) Mr Green was resident in Australia during the relevant period and had been so for over five years. He sold his interest in a property in the UK on 13 January 2017.

    (2) In accordance with section 12 ZB TMA 1970, the NRCGT return was required to have been filed no later than 12 February 2017.

    (3) The NRCGT return was filed on 26 September 2017 and so was submitted more six months late.

    (4) Consequently, the penalty determinations set out above were issued to Mr Green.

Relevant law

4. The requirement to made NRCGT returns was introduced into the Taxes Management Act 1970 ('TMA') by the Finance Act 2015.

5. 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.

6. 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).

7. The relevant penalties are calculated on the following basis:

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

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

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

9. 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). 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).

10. The legislation provides that a taxpayer may be relieved from penalties if he or she can show that there was a "reasonable excuse" for the default (paragraph 23). An insufficiency of funds, or reliance on another person, are prohibited by the same paragraph from being a reasonable excuse. In addition, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse only if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

11. 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). 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)).

Appellant's case

12. Mr Green's case can be summarised as follows:

> (1) He has been resident in Australia for over five years and was not aware that there had been a change in the law in 2015 requiring non-residents to file a NRCGT return on sale of a UK residential property. The requirement was not mentioned in the 2015/16 online self-assessment return which Mr Green had completed, although he did not know if it was mentioned in the capital gains section of the return as that section is only visible if one has a capital gain for that tax year and he did not have a capital gain in 2015/16.
>
> (2) He engaged a UK conveyancing agency to deal with the sale of the property. The agency did not mention the requirement to file a NRCGT return although, as a conveyancing agency, they may not have signed up for agent updates from HMRC.
>
> (3) The information about NRCGT is difficult to find on gov.uk, as indicated in the First Tier Tribunal decisions of *McGreevy* [2017[UKFTT 690 (TC) and *Saunders* [2017] UKFTT 765 (TC), which also found that it was unreasonable to expect an individual who lived abroad to be aware automatically of the changes. These decisions considered that, in such cases, ignorance of the law may amount to a reasonable excuse. Similarly, the case of *Perrin* [2018] UKUT 0156 (TCC) makes it clear that it cannot always be said that "ignorance of the law is not excuse" but, instead, it should be considered whether it was objectively reasonable for the individual to have been ignorant of the relevant law.

(4) HMRC have, further, not explained how Mr Green was to know in January 2017 that he needed to look for the specific information. A website search undertaken indicated that the reporting deadline was mentioned in only two articles in the UK press.

5 (5) Mr Green was aware, as most people are, that capital gains tax is payable after the same of a property that is no longer one's principal home. He believed that all capital gains were reported via the self-assessment form, although he had never had any capital gains to declare and had therefore never used that section of the form. He had no reason to believe that an additional requirement had been 10 imposed.

(6) As Mr Green had letting income he has remained with the UK tax reporting system and has completed the same self-assessment tax return as UK residents. There are no special requirements for overseas residents reporting letting income. Mr Green believed, accordingly, that any capital gains tax would be dealt with in 15 the same way as that applying to UK residents. He was not aware that non-UK residents did not pay capital gains tax before April 2015.

(7) Mr Green received emails each year from HMRC notifying him of the need to complete his self-assessment return. He mistakenly believed that HMRC would notify him if there was any significant change to the reporting system and so had 20 no reason to believe anything had changed.

(8) It was unreasonable to expect someone with a full time job and a young family to spend his free time searching gov.uk for something he might need to knew, when he had no idea what it was that he did not know. No research was required for the sale process itself, as suitable agents were identified from 25 recommendations from friends in the local area.

(9) Contrary to HMRC's assertion, Mr Green was not carrying on a business; he has no experience of or links with the property industry. The property disposed of had been purchased and used as a home by Mr Green and his partner until they moved to Australia, when it was rented out. Once they had started a family, it 30 became clear that the UK property would be too small to be used if they returned to the UK in future and it was then sold as there was no point in keeping it. Mr Green has never owned any other property in England.

(10) His UK tax return was generally completed in June, around the same time as their Australian return but, in 2017, when he started to complete the tax return 35 Mr Green found that the capital gains tax section was not available to non-UK residents at that time. He was unable to investigate further because they moved house in June and then visited relatives in the UK in July. He flew from the UK to North America for work purposes, and all financial records were on his computer in Sydney and so it was not until September 2017 that he was able to 40 contact HMRC and, subsequently, engage an online firm to assist with the tax returns.

(11) It was at this time that he discovered from HMRC that an NRCGT form should have been filed within 30 days of the sale, but the HMRC adviser recommended that they address the situation and say that they had not been aware

of the requirement as they were aboard. Mr Green did not take the HMRC adviser's name.

(12) Mr Green asked the online firm about the form, but this request was apparently overlooked by the firm. It was only after undertaking some more research that he realised the form was a separate requirement and was seven months overdue.

13. Mr Green submitted that his belief that he only needed to report the sale via his self assessment form was reasonable in his circumstances and the situation was rectified without unreasonable delay when the error was identified.

14. It was also submitted that the penalties are unfair and disproportionate to the alleged infringement as there was no capital gains due on the sale.

HMRC's case

15. HMRC's case is, in summary, that:

(1) The return should have been filed by 12 February 2017. They submitted that there was extensive information publicly available both before and after the change in legislation and Mr Green had an obligation to stay up to date with legislation affecting their activities in the United Kingdom. It is not reasonable to expect HMRC to individually contact every non-resident who files a self-assessment return to make them aware of the regime.

(2) HMRC does not believe that a lack of awareness of the law is a reasonable excuse as this would mean that those people who choose to remain ignorant of the law would benefit over those who knew the law and had complied with it (as set out in *Qualapharm* [2016] TC 04891, and also in *Hesketh* [2017] UKFTT 05804/05807 (TC)). HMRC would expect a prudent person, exercising reasonable foresight and due diligence, with a proper regard to their responsibilities under tax law, to have researched what was expected regarding their tax obligations.

(3) HMRC submitted that there was extensive information available both before and after the change in legislation, which was first announced in December 2013 and then followed up with information published on gov.uk on 6 April 2015. This information clearly states that the deadline for reporting the disposal is 30 days.

(4) HMRC contended that submission of an NRCGT return does not require specialist advice which would require Mr Green to rely on an adviser.

(5) Mr Green had been in receipt of income from property for thirteen years and, as a person conducting a business activity, had a responsibility to ensure that he was up to date with the legislation affecting it.

(6) HMRC contended that Mr Green had an obligation to stay up to date with UK legislation affected his activities in the UK.

(7) HMRC would expect that a diligent taxpayer intending to comply with their tax obligations would, on disposing of a property in another country, research the

tax obligations arising rather than making an assumption that it would all be dealt with via his self-assessment return.

(8) HMRC do not consider that looking after a family and working fulltime constitute a reasonable excuse for failure to comply with reporting obligations.

(9) It was unrealistic to expect HMRC to contact every non-resident individual who may wish to sell their property.

(10) HMRC would not expect a conveyancing agent to provide tax advice but would expect a taxpayer to seek tax advice from a tax adviser or from HMRC. Paragraph 23(2)(b) of Schedule 55 specifically precludes reliance on a third party from being a reasonable excuse unless the appellant took reasonable care to avoid the failure. Further HMRC consider that it would be unusual, unless explicitly instructed to do so, for a a conveyancing agent to advise on tax matters.

(11) The fact that no capital gains tax was due does not impact on the requirement to file the NRCGT return. The penalties are an administrative means of securing the production of timely returns, to encourage compliance. They are intended as a measure of fairness to ensure that customers who file late obtain no advantage over those who file on time. HMRC submitted that the penalties are not disproportionate, and the penalty regime is proportionate in its aims.

16. HMRC had considered whether there were any special circumstances in this case and concluded that there were none which were uncommon or exceptional that would allow the penalty to be reduced.

Discussion

Reasonable excuse

17. There is no statutory definition of "reasonable excuse" but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

> "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

18. The issue here is whether Mr Green'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?

19. There has been a divergence of view in cases before this Tribunal. In two cases, *McGreevy* [2017] UKFTT 690 (TC) and *Saunders* [2017] UKFTT 765 (TC) the Tribunal held that that lack of awareness did amount to a reasonable excuse.

20. Judge Mosedale, in both *Welland* [2017] UKFTT 870 (TC) and *Hesketh* [2017] UKFTT 871 (TC) and Judge Brannan in *Hart* [2018] UKFTT 207 (TC) disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

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

22. The Upper Tribunal, whose decisions are binding upon me, considered in *Perrin* [2018] UKUT 156 (TC) that "it will be a matter of judgement for the [First Tier Tribunal] 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".

23. Mr Green has been resident outside the UK for at least five years, and states that he did not know about the 30 day reporting obligations. However, Mr Green did not provide any specific information to indicate that he had in fact kept up to date with the UK legislation. On the contrary, Mr Green stated that he expected that HMRC would advise him if there were any substantial changes in reporting requirements. Mr Green also assumed that the gain should be reported on his self-assessment return.

24. I consider that a taxpayer in the position of Mr Green, with a responsible attitude to their duties as a taxpayer, having been outside the UK for a number of years and not having previously sold a UK property (whether whilst UK resident or otherwise) would have been aware that their knowledge of tax law may not be up to date or accurate and would have made enquiries as to the UK tax requirements at the time of the sale of the property and made sure that these were followed, rather than making assumptions as to the reporting process.

25. Mr Green does not indicate that any steps were taken to establish the relevant UK tax position and, instead, stated that he assumed that the reporting requirement would be the same as that which he believed applied to UK residents.

26. I find therefore that he did not take any steps to determine the UK tax reporting requirements and instead relied on his assumptions as to the state of the law and therefore, I find, it is not objectively reasonable of him to have been ignorant of the requirement in question. I find that Mr Green therefore does not have a reasonable excuse for the failure to file the return on time as a result of his lack of knowledge of UK tax law.

Conveyancing agent

27. Mr Green states that his conveyancing agent did not tell him about the reporting obligation, but he also does not say that he relied upon that agent to tell him of the reporting requirements.

28. It is clear from the legislation that reliance on a third party does not amount to a reasonable excuse; however, it may be that case that where an appellant takes reasonable care to avoid the failure that a reasonable excuse can be established. As Mr Green does not say that he specifically asked for tax advice from the conveyancing agent, I find that the agent's lack of advice as to the reporting requirements cannot provide him with a reasonable excuse.

Fairness

29. Tribunal's jurisdiction is derived entirely from statute and, as the Upper Tribunal stated in *Hok* (§36), the First Tier Tribunal "… has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair". Although *Hok* was concerned with VAT rather than NRCGT, it is clear that the principle applies to all penalties and so I consider that I have no jurisdiction to consider Mr Green's contentions that the penalties are unfair.

Proportionality

30. Mr Green has argued that the penalties charged are disproportionate. 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 only where there are "special circumstances" and, elsewhere in this decision, I have considered the question of "special circumstances".

31. Therefore, for reasons similar to those set out in *HMRC v Bosher* [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

Special circumstances

32. Finally, I must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction.

33. Case law has determined that, to be a special circumstance, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves, and must be "something out of the ordinary, something uncommon [or] exceptional, abnormal or unusual" and normally something external to the person doing the action in question, in contrast to something within his control.

34. Applying the judicial review standards, I can find no reason to overturn HMRC's decision.

Conclusion

35. The appeal is dismissed and the penalty confirmed in full.

36. 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 FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 20 DECEMBER 2018