



**TC06173**

**Appeal number: TC/2017/02882**

*Capital Gains Tax - TMA 1970 s 12ZB Non-resident CGT return - Schedule 55 Finance Act 2009 - fixed penalties for late filing of self-assessment return - non-resident Appellant failed to report capital gain within 30 days of disposal - Appellant unaware of obligation introduced by Finance Act 2015 - whether reasonable excuse - yes - appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PATSY-ANNE SAUNDERS**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**The Tribunal determined the appeal on 26 July 2017 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 29 March 2017, HMRC's Statement of Case received by the Tribunal on 10 May 2017 and the Appellant's reply of 21 May 2017.**

## DECISION

- 5 1. This is an appeal by Mrs Patsy-Anne Saunders ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the Appellant of her Non-resident Capital Gains Tax return ('NRCGT') for the tax year ending 5 April 2016.
- 10 2. The Appellant was required by s 12ZB TMA 1970 to deliver a NRCGT for the year ending 5th April 2016, 30 days after the date of disposal of a property held by her.
3. The Appellant disposed of a property in the United Kingdom on 15 November 2015, on which she made a Capital Gain (although after the cost of capital improvements and acquisitions/disposal costs a capital loss).
- 15 4. In accordance with s 12ZB TMA 1970 the NRCGT return was required by HMRC no later than 15 December 2015 but was not filed until 15 August 2016.
5. The penalties for late filing of a return can be summarised as follows:
  - 20 i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the NRCGT return.
  - ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
  - iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
  - 25 iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.
6. Penalties of £100, £900 and £300 were imposed, under (i), (ii) and (iii) above.
- 30 7. The Appellant's appeal is against all the penalties, although HMRC have now confirmed that the £900 daily penalties are waived.

### *Filing date and Penalty date*

8. Under s 12ZB TMA 1970 the NRCGT return was required by HMRC no later than 15 December 2015. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
- 35 9. A late filing penalty is chargeable where a taxpayer is late in filing their NRCGT return.

*Point at issue*

10. Whether the Appellant has a reasonable excuse for late filing of the NRCGT return for the period ending 5 April 2016.

5 11. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

12. If there is a reasonable excuse it must exist throughout the failure period.

*The background facts*

10 13. The Appellant has been resident in Saudi Arabia since 2012. She received rental income from a UK property and therefore continued to file an individual self-assessment tax return.

15 14. For the tax year 2014-15, (being the year before that in which the disposal took place), the SA100 tax return (bearing designation 'HMRC 12/14' in the bottom right-hand corner of each page) does not contain any reference to NRCGT returns. December 2014 was of course four months prior to the date (6 April 2015) on which section 12 ZB TMA came into effect.

20 15. The notice to file her individual self-assessment return for the year ending 5 April 2016 was issued to the Appellant on 6 April 2016. The filing date for the Appellant's return was 31 October 2016 for a non-electronic return and 31 January 2017 for an electronic return.

25 16. The Appellant disposed of a property in the United Kingdom on 15 November 2015. Her NRCGT return was therefore required by HMRC no later than 15 December 2015, but was not filed until 15 August 2016, when the Appellant completed her 2015-16 SA return.

30 17. The property was her former home (rented out since 2012 when she moved to Saudi Arabia to join her husband). She sold the property for £130,000 having purchased it for £121,995 and having spent £11,000 on improvements. Her acquisition and disposal costs totalled £3400. In the return's capital gains tax summary pages, the Appellant inserted a loss of £6395

35 18. Box 37 on page CG2 in SA108 asks the taxpayer to tick the box if they have 'submitted a non-resident capital gains tax return for the disposal of a UK residential property or properties during 2015'. This may have been what prompted the Appellant to make further enquiries of HMRC and discover for the first time that she should have filed a NRCGT return no later than 15 December 2015.

19. The Appellant says that until speaking to HMRC she was unaware of the provisions of s 12ZB TMA 1970 and intended to declare the capital gain in her individual 2016-17 self-assessment return.

20. On 16 September 2016 (upon receipt of the Appellant's return) as the NRCGT return was not received until over six months after the penalty date, HMRC issued notices of penalty assessments of £100, £900 and £300.

21. On 23 September 2016, the Appellant appealed against the penalty saying that:

5            "...in the process of completing [my 2015-16 self-assessment return] I sought guidance from an HMRC representative on filling in the capital gains tax sections and it was at this point that I became aware of a change in regulation for non-residents.... Clearly, had I known of the change to reporting regulations I would have reported the property sale immediately and would not have allowed such a penalty to build up.

10           I therefore kindly request leniency with respect to this penalty for the following reasons:

- I have not sought to mislead or withhold any information or tax owing regarding the sale.
- I have no record of receiving HMRC correspondence advising me of the changes to the UK tax reporting requirements for non-residents.
- My only mistake was to be unaware of a change in UK tax regulations.
- The revised regulations have likely been established to address overseas property investors from attempting to withhold monies owed to the HMRC. I wholly agree with such a tightening of regulations. But as you can plainly see, in this instance no attempt has been made by myself to deceive or withhold information or monies owing, instead my only misdemeanour is one of ignorance,
- No financial loss has been incurred by the HMRC from my failure to report my property sale within the new reporting regulations as there is no tax owed from the sale.
- The HMRC request for me to pay a £1,300 penalty is wholly disproportionate for what was an unintentional error.
- If the HMRC are intent on seeking a penalty for what was an honest mistake and with no intention to deceive then I request that the penalty be limited to the initial £100 fine only, and that the additional £1,200 be waived."

20           22. HMRC rejected the Appellant's appeal on 28 January 2017, but offered a review.

23. The Appellant wrote to HMRC saying she considered that she had a reasonable excuse and requested a review on the basis that:

- Due to her lack of awareness, caused by being non-resident and without notification from HMRC she had "*no ability to know what I could not know*"
- In the absence of legal definition, that she had "*more than met the intent of 'reasonable excuse'. For clarity, at no time have I sought to deceive*"

24. She continued (in summary and so far as relevant):-

5 *“I am not a wealthy overseas investor. I am designated a non-resident, having lived in Saudi Arabia for the past 4 years. I am a housewife and mother of two children. I work voluntarily at a nursery during the day. I do not have a portfolio of properties or a history of buying and selling property and have no business investment experience. My only mistake was to sell a property and report the sale in accordance with my year-on-year practice of returning Self-Assessment forms as undertaken since 2012.*

10 *The response from HMRC has been heavy handed and disproportionate to my situation. I have acted in good faith and even offered a settlement in my original appeal. But instead of applying 'reasonableness' the HMRC have sought to apply full retribution.*

15 *Selling a property for most people is something done maybe once or twice in a lifetime. This was my second property sale and the first for over ten years. I would not knowingly have sought to withhold this information in regards to the new disclosure timescales and had instead acted in accordance with a Self-assessment practice I had become used to undertaking. To suggest otherwise is to suggest I sought to invite a fine upon myself which I presume you are inferring makes me an idiot—to imply such I find deeply offensive.*

*I feel the need to remind HMRC of a crucial piece of information — I didn't owe HMRC any capital gains tax from this property sale.*

20 *Interestingly I received no notification from the HMRC of any such failure to disclose and must deduce that had I been dishonest and not sought to disclose this information that it would likely never have come to light. But I am not dishonest!”*

25. HMRC carried out a review and issued their conclusion on 17 March 2017 saying that their decision should be upheld.

26. On 29 March 2017 the Appellant lodged an appeal before the Tribunal.

25 27. On 10 May 2017 HMRC issued its Statement of Case. As a preliminary matter HMRC said that they were arranging for the daily penalties, raised under Paragraph 4, Schedule 55 FA 2009 to be waived, and were writing to the Appellant to advise her of that.

30 28. HMRC said that the remaining fixed filing penalties of £400 were not affected by this decision.

29. On 21 May 2017, the Appellant replied to HMRC's statement of case, saying (again so far as relevant and not already submitted)

35 *“.....Interestingly I learned today from a colleague who I have discussed my issues with, that following the sale of their property they had to advise their Accountant of the change in reporting regulations for non-residents as their Accountant was unaware. It seems that even the professionals are unsighted on changes affecting non-residents even despite the alleged new legislation announcement made in Chancellors Autumn Statement in December 2014.*

5 *I noted the legislation and case law cited in [the statement of Case] and the further publications that have apparently been made across various media following 2014. Unfortunately, I am not legally trained. I am a wife and mother, and being resident overseas since 2012, had no expectation that legislation had changed, given my self-assessment reporting continued to invite me to report on capital gains tax....”*

Relevant statutory provisions

**Taxes Management Act 1970**

10 30. The legislation relating to the delivery of an NRCGT return is set out at s 12ZA - ZN of the Taxes Management Act (TMA) 1970 which were inserted into TMA by the Finance Act 2015, Schedule 7, Part 2 ‘Other amendments’. S12ZA is the Interpretation section and S12ZB is a section in which imposes the obligation to file a NTCGT return

12ZA Interpretation of sections 12ZB to 12ZN

- 15 (1) In sections 12ZA to 12ZN—
- “advance self-assessment” is to be interpreted in accordance with section 12ZE(1);
- “amount notionally chargeable” is to be interpreted in accordance with section 12ZF(1);
- 20 “filing date”, in relation to an NRCGT return, is to be interpreted in accordance with section 12ZB(8);
- “interest in UK land” has the same meaning as in Schedule B1 to the 1992 Act (see paragraph 2 of that Schedule);
- the “taxable person”, in relation to a non-resident CGT disposal, means the person who would be chargeable to capital gains tax in respect of any chargeable NRCGT gain (see section 57B of, and Schedule 4ZZB to, the 1992 Act) accruing on the disposal (were such a gain to accrue).
- 25 (2) In those sections, references to the tax year to which an NRCGT return “relates” are to be interpreted in accordance with section 12ZB(7).
- (3) For the purposes of those sections the “completion” of a non-resident CGT disposal is taken to occur—
- 30 (a) at the time of the disposal, or
- (b) if the disposal is under a contract which is completed by a conveyance, at the time when the asset is conveyed.
- (4) For the meaning in those sections of “non-resident CGT disposal” see section 14B of the 1992 Act (and see also section 12ZJ).
- 35 (6) In this section “conveyance” includes any instrument (and “conveyed” is to be construed accordingly).

S 12ZB NRCGT return

5 (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, or

(b) if the disposal is made by a member of an NRCGT group, the relevant members of the group.

10 (3) A return under this section is called an “NRCGT return”.

(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.

15 .....

(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.

20 **Schedule 55 Finance Act 2009:**

31. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

Paragraph 1 (4) states that the ‘penalty date’ is the date after the ‘filing date’.

Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

25 Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(1) P is liable to a penalty under the paragraph if (and only if) -

30 (a) P’s failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

35 (2) The penalty under the paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

- (3) The date specified in the notice under sub-paragraph (1)(c) -
  - (a) may be earlier than the date on which the notice is given, but
  - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

- (1) P is liable to a penalty under the paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
- (2) The penalty under the paragraph is the greater of -
  - (a) 5% of any liability to tax which would have been shown in the return in question, and
  - (b) £300.

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Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

- (1) Liability to a penalty under any paragraph of the Schedule does not arise in relation to a failure to make a return if P 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.

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32. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the Schedule.
- (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.
- (3) In sub-paragraph (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.

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33. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:



- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may -
- 5 (a) affirm HMRC's decision, or
- (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16 -
- 10 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
- (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of
- 15 the principles applicable in proceedings for judicial review.

### *Burden of Proof*

34. The onus of proof is on HMRC to show that the penalties have been correctly calculated. The burden then shifts to the Appellant to demonstrate that a reasonable
- 20 excuse exists for the defaults.

### *Standard of Proof*

This is the common law standard, that is, the balance of probabilities

### **The Appellant's case**

35. The Appellant's case is clearly set out in her correspondence but can be
- 25 summarised thus:

1. She was not aware that a NRCGT return was required 30 days after the date of disposal. Capital Gains reporting of property sales changed between submission of her 2014/15 self-assessment and her 2015/16 self-assessment returns.
- 30 2. It was reasonable for the Appellant to expect reporting to remain as per previous self-assessments given that she had received no notification of changes by post or email. She has been resident overseas since 2012, and was undertaking only her second ever property sale and the first for circa 10 years.
- 35 3. The purpose of the penalty structure was to dissuade people from withholding capital gains owing to HMRC, primarily from those dealing in multiple property sales.
4. She owes no capital gains tax.
5. She has twice offered to pay the initial penalty of £100 to acknowledge her error.

6. Having not known of the issue and application of penalties for the first 30 days, she couldn't have reasonably been expected to know of the following further periods in respect of which additional penalties applied.

*HMRC's Case*

- 5 36. The Appellant states that she owes no tax. Regulations are in place to ensure compliance, with the requirement to submit returns, not taking into account tax liability. The submission of the return is required to enable HMRC to check the liability.
- 10 37. In relation to disposals made on or after 6 April 2015 a NRCGT return should have been submitted to HMRC in accordance with Paragraph 8 of s 12ZB TMA 1970 which states:
- “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.”
- 15 38. The return should therefore have been submitted to HMRC by 15 December 2015 as the date of disposal as per the NRCGT return submitted was 15 November 2015.
39. The return was submitted on 15 August 2016 which was late by 245 days.
- 20 40. The new legislation was announced in the Chancellor's Autumn Statement in December 2014. [this is a mistake by HMRC as the date was December 2013]. This was followed up by Capital Gains Tax for Non-Residents UK Residential Property, which was first published at [www.gov.uk/hmrc](http://www.gov.uk/hmrc) on 6 April 2015. This is many months before the disposal of the Appellant's property on 15 August 2015.
41. The Appellant had an obligation to stay up to date with legislation affecting her activities within the United Kingdom.
- 25 42. The Appellant did not take care to avoid the failure to ensure that her NRCGT return was filed within the statutory 30 day time limit.
43. Paragraph 23 of Schedule 55 FA 2009 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.
- 30 44. The law specifies two situations that are not reasonable excuse
- i. an insufficiency of funds, unless attributable to events outside the Appellant's control and
  - ii. reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
- 35 45. Ignorance of the law is not considered a reasonable excuse.

46. The Appellant has not given a reasonable excuse for the late submission of her NRCGT Return.

47. The penalty date in this appeal was 15 December 2015 for the period ending 5 April 2016. The NRCGT return was only submitted on 15 August 2016.

5 48. The penalty imposed in the amount of £100 under Paragraph 3 of Schedule 55, Finance Act 2009 has been correctly charged in that the NRCGT return for the period under appeal was not submitted by the penalty date as per Paragraph 1 (4) of Schedule 55, Finance Act 2009.

10 49. The further penalty imposed in the amount of £300 for the period ending 5 April 2016 under Paragraph 5 of Schedule 55, Finance Act 2009 have also been correctly charged.

50. The penalties imposed were therefore issued correctly in accordance with the relevant legislation.

15 51. Each case is taken on its own merits. The Upper Tribunal found that the First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair. The decision of the Upper Tribunal creates a precedent and is binding on all cases where similar issues are raised.

20 52. HMRC also submit that the penalties are not disproportionate and the penalty regime is proportionate to its aim. In order for a national measure to be considered disproportionate, it must be “not merely harsh but plainly unfair” (see *International Transport Roth GmbH v SSHD* [2002] EWCA Civ 158). HMRC contend that the penalties imposed here are not ‘plainly unfair’ and fall within the wide margin of appreciation in framing and implementing taxation policies (Bysermaw at para.71). Moreover, the regime includes provisions for ‘reasonable excuse’ and ‘special circumstances’ which allow mitigation in appropriate cases.

#### *Special reduction*

53. Paragraph 16 of Schedule 55, Finance 2009 provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances.

54. HMRC have considered:

- 30 i. that the Appellant was not aware that a NRCGT return was required 30 days after the date of disposal;
- ii. that the Appellant believes that the purpose of the penalty structure was to dissuade people from withholding capital gains owing to HMRC, primarily from those dealing in multiple property sales;
- 35 iii. that the Appellant owes no tax;

- iv. that having not known of the issue and application of penalties for the first 30 days, the Appellant couldn't have reasonably expected to know for the following next periods of penalties applied.

5 On the information held, HMRC do not consider there are any special circumstances which were uncommon or exceptional that would allow the penalty to be further reduced.

### **Conclusion**

10 55. Late filing penalties are raised in accordance with Schedule 55 Finance Act 2009 because a self-assessment tax return is filed late, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Legislation has been changed and penalties are no longer linked to liability.

56. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

15 57. Self-assessment places a greater degree of responsibility on customers for their own tax affairs. This includes ensuring that HMRC receive payment of the correct amount of tax at the correct time. The tax guidance and HMRC's website give warning about filing and payment deadlines. It is the customer's responsibility to make sure they meet the deadlines.

20 58. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

### *Was the Appellant obliged to submit a NRCGT return?*

25 59. Before considering whether the Appellant has a reasonable excuse for the late filing of her NRCGT return, I question whether there was any obligation on her to do so. HMRC's publication "CGT for non-residence: UK residential property" states that a disposal must be reported even if the tax payer has no tax to pay or made a loss.

30 60. However S12ZB TMA state at sub-section(1) that where a non-resident Capital Gains Tax disposal is made "the appropriate person" must make and deliver to an office of HM Revenue and Customs on or before the final date a return in respect of the disposal. S12ZB (ii) defines "the appropriate person" as "the taxable person in relation to the disposal" and "taxable person" is defined in S12ZA as meaning the person who would be chargeable to Capital Gains Tax in respect of any chargeable NRCGT gain.

35 61. The ordinary reporting requirements of HMRC for Capital Gains Tax purposes are that a disposal must be reported if a gain or loss arising on the sale of a chargeable asset. In certain circumstances it is not necessary to report the disposal providing certain conditions are met, which are that the gain is under the annual exemption, the proceeds of sale are less than 4 times the annual exemption and the tax payer is

resident and domiciled in the UK. If the tax payer does not meet these conditions then the gain must be reported whether or not there is tax to pay and whether or not a loss has been made and under self-assessment the only method of reporting the gain/loss is by means of the self-assessment return. However, these reporting requirements only relate to self-assessment returns. The obligation to file a NRCGT return is entirely separate and governed by separate legislation.

62. In this case the Appellant made a loss so therefore the question has to be asked whether she could be a “taxable person” given that she would have not been chargeable to Capital Gains Tax and that there would not have been any chargeable NRCGT gain. Therefore on a strict reading of S12ZA and S12ZB the Appellant did not have an obligation to file a NRCGT return given that she had made a loss.

*Reasonable excuse*

63. There is no statutory definition of “reasonable excuse”. Whether or not a person had a reasonable excuse is an objective test and “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland V HMRC (2006) STC (SCD) 536* at paragraph 18).

64. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person’s control, which prevents him or her from complying with an obligation which otherwise they would have complied with.

65. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and a degree of due diligence, having a proper regard for their responsibilities under the Tax Acts. However these obligations depend upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. 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.

66. HMRC say that the Appellant has no reasonable excuse for her failure to deliver a NRCGT return and that there was ample publicity for the fact that a non-resident who disposes of a dwelling situated in the UK must make a NRCGT return within 30 days of the completion date. They refer to the new legislation being announced in the Chancellor’s Autumn Statement in December 2014 ( actually 2013) and that this was followed up by ‘Capital Gains Tax for Non-Residents UK Residential Property’, which was first published at [www.gov.uk/hmrc](http://www.gov.uk/hmrc) on 6 April 2015, many months before the disposal of the Appellant’s property on 15 August 2015.

67. HMRC says that:

- i. the Appellant had an obligation to stay up to date with legislation affecting her activities within the United Kingdom.

- ii. ignorance of the law is no excuse; that she should have been aware of the changes effected by s 12ZB TMA 1970
- iii. the obligation to file a NRCGT return within 30 days of a disposal cannot be regarded as obscure or complex law.

5 68. Without qualification, I am not able agree with HMRC's assertions as set out in the last paragraph.

- i. To assert that the Appellant had an obligation to stay up to date with, and therefore understand new legislation affecting her, necessarily imports an obligation to do so almost immediately the legislation takes effect. The Appellant had been filing her SA returns for three years. The obligation to file the NRCGT return had only been introduced on 29 March 2015 (the date of Royal Assent) to take effect from 6 April 2015. Was it reasonable for her to assume that she would only need to return the gain (if there was a returnable gain – see below) in the usual way, that is up until 2015-16 on her SA tax return, particularly given that there had been no mention of pending changes in the law in the CG notes which accompanied her previous 2014-15 return?

Was it reasonable to expect her to read the Chancellor's Autumn Statement in December 2013?. The Statement (Green Book) ran to 123 pages and the proposal regarding non-resident capital gains on the sale of UK properties was contained in a six line paragraph at 1.295 as follows.

*'1.295 Autumn Statement 2013 announces further measures to ensure that those with the means to do so continue to pay their fair share of tax. The government will ...introduce capital gains tax on future gains made by non-residents disposing of UK residential property from April 2015 – a consultation on how best to introduce the new capital gains tax charge will be published in early 2014'*

There was nothing in the 2014 Autumn Statement about NRCGT. Even if the Appellant was aware of paragraph 1,295 of the 2013 statement, the omission from the 2014 Statement of anything relating to NRCGT may have led her to believe that the proposed tax changes had been abandoned.

Was it reasonable to expect her to acquaint herself with the consultation that followed and the publication '*Capital Gains Tax - non-residents: UK Residential Property*' published on HMRC's website on 6 April 2015? Possibly, but only if she had been alerted to its existence. It would, one assumes, have been relatively straightforward for HMRC to alert those non-residents filing returns in respect of rental income received on a UK property, to the prospective changes in the law, as they did with the introduction of penalties for late payment of CIS and PAYE and the introduction of RTI (Real Time Information).

- ii. Although there is not and never has been a presumption that everyone knows the law, there is a rule of law that ignorance of the law does not excuse - a

5 maxim of different scope and application. But the law in question is the criminal law where ‘*mens rea*’ must be shown (the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the ‘*Actus Reus*’ – the action or conduct of the accused in the commission of a crime). The concept in criminal law that ignorance of the law does not excuse is necessary, otherwise proof of intent could be impossible.

10 In civil law however it does not apply, otherwise it would mean that everyone must know all the law, all of the time. The concept that ‘ignorance of the law is no excuse’ does not apply and a mistake or ignorance of the law may have the effect of negating ‘*mens rea*’, thereby providing a reasonable excuse.

15 However it is necessary for the proper administration of the taxation system and for the enforcement of fiscal legislation and regulations for there to be a rebuttable presumption that a tax payer is aware of the law that affects him or her and the burden of proof for displacing that presumption is necessarily set at a high threshold.

iii. Was the new legislation obscure or complex? Not if the Appellant knew about it or where to find it. But understandably she did not. To quote Judge Richard Thomas in a very similar case:- *Rachel McGreevy v HMRC* [2017] UKFTT 0690 (TC) :Paras 173, 174 and 176:

20 “174. HMRC seem to be suggesting the appellant should have been knowledgeable about the law in this area where in my view the subject matter is arcane, difficult to find and counter-intuitive. I consider I have a better than average grasp of tax law and how it is constructed and interpreted. But as I have read sections 7A and 12ZA to 12ZI TMA and the NRCGT provisions in  
25 TCGA 1992 my eyes have glazed over and my senses reeled. Do HMRC really think that ordinary taxpayers, even, or rather especially, non-residents, should be expected to understand say s 12ZH TMA on the interaction of NRCGT returns and s 8 returns, or to understand the implications for penalties for late filing of NRCGT returns when s 12ZBA(7) says:

30 “(7) Paragraph 1 of Schedule 55 to the Finance Act 2009 (penalty for late returns) does not apply in relation to an NRCGT return which is made and delivered by virtue of this section.

35 175. This does not apply in this case. I now know that after a lot of research. But I do not think it all reasonable for HMRC to expect a non-resident, non-tax expert to know that....”

40 176. ....it is also preposterous to expect that a document on HMRC’s website which is not easy to find for a tax judge makes invalid all possible excuses about not knowing of the NRCGT return deadlines.”

69. It is clear that the Appellant had a genuine and honest belief that the gain could be declared in her 2015-16 tax return, in January 2017. Taking into account my reasoning above I find that the Appellant had a reasonable excuse for making that mistake and the late submission of her NRCGT return, in the event that I am incorrect and an obligation to make a return existed.

70. The appeal is therefore allowed and the late filing penalties discharged.

71. 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.

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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 18 OCTOBER 2017**

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