[2017] UKFTT 871 (TC)

TC06266

Appeal number: TC/2017/5804 and 5807

PENALTIES – late filing of NRCGT returns – what HMRC must prove - whether ignorance of the law is a reasonable excuse – no – whether special circumstances – no – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID HESKETH **Appellants**
-AND-
JENNIFER HESKETH

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers as the appeals were categorised as default paper and neither party applied for an oral hearing

Mr R Maas, of Carter Backer Winter LLP.

Ms D Waldron, HMRC officer, for the Respondents

DECISION

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

The facts

2. Mr and Mrs Hesketh have been non-resident in the UK for many years: they reside in Singapore.

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

4. The appellants sold a jointly owned property situated in London. The date of completion was 9 December 2015. The NRCGT return shows the date of disposal as the same date. The return also shows that the sale was at nil gain or loss and that no tax was owed.

5. They did not file an NRCGT return until 4 January 2017.

6. On 28 January 2017 HMRC imposed a late filing penalty of £100, a six months' late filing penalty of £300 and £900 of daily penalties. They later removed the daily penalties so the issue in this appeal is the £400 in penalties imposed on each of the two taxpayers (in other words, a total of £800 is at stake in this appeal).

7. A guidance note on NRCGT including the obligation to file a return within 30 days of completion, was on HMRC's website from 6 April 2015. There was some dispute between the parties as to how easy/difficult it was to find on the website the dispute was not material as there was no suggestion that Mr and Mrs Hesketh had actually consulted HMRC's website.

8. It is also HMRC's case that HMRC operated a 'light touch' in that they did not impose any late filing penalties on NRCGT returns filed on or before 7 May 2016. The appellants do not appear to take any issue with this; in any event, both parties are effectively agreed that Mr and Mrs Hesketh did not benefit from any light touch (their returns were not filed until 2017.)

The law

9. 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).

10. 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?

11. 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.

12. 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).

13. 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

14. 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).

15. 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.

16. 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

17. 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.

18. 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 sold must have been located within the UK;

(b) They 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.

19. HMRC do not really address any of these matters in their statements of case. In some instances, the position is made clear from consulting the NRCGT return itself: the returns show that (a) the property was in London and (e) appear to indicate that the disposal was after 6/4/15 (I will revert to this point). The appellants clearly accept that they have been non-resident for many years: (c). But I have no information about conditions (b) and (d).

20. 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.
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> ...
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> [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.
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> ...
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> [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
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> [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?

21. I cannot see in the papers any clear statement by or on behalf of the appellants that they accepted that they were liable to file the NRCGT returns which they filed late: but at the same time, all the representations made on their behalf clearly assume that they were so liable. For instance, Mr Maas makes many comments about their ignorance of the law: but their ignorance of the law is only relevant if the law applied to them. Moreover, the mere fact that they filed the returns indicates that they believed they were liable to so do.

22. While *Burgess and Brimheath* says that acceptance of HMRC's case cannot be inferred from silence, this is not silence. Everything that the appellants have done in this matter, from the moment they filed the NRCGT returns, has indicated to HMRC that they accept that they were liable to file the returns. HMRC have not positively addressed the appellants' liability to file the returns in their statements of case but in these circumstances it is not really surprising. 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.

23. I consider that the appellants' acceptance of their liability to make the NRCGT returns should be inferred from the fact that they submitted them and their representations have always been made on the clear assumption that they were so liable.

Undisputed evidence of date of disposal

24. Before leaving this topic, I said at §19 that I would revert to the question of the date of disposal.

25. For CGT purposes (see s 28 TCGA) the normal date of disposal is the date of the contract. The date of disposal is relevant because it is only if it fell in tax year 15/16 that the appellants were liable to make a NRCGT return. Had the date of the contract been in tax year 14/15 (ie on or before 5 April 2015) then the appellants would have had no liability to make NRCGT returns.

26. In a different context, discussed below, Mr Maas 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.

27. In that case, similarly to the two 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.

28. Mr Maas 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.

29. 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.

30. 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. A Tribunal 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.)

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

32. The dates of the NRCGT returns also show that the appellants (as they accept) failed to make a NRCGT return within 30 days of completion of the sale on these properties; indeed they show that they failed to make such returns for nearly a year after the sale.

The law on the penalties

33. 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').

34. §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.

35. §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. That last penalty is not relevant here as the appellants filed their NRCGT return just before the 12 months expired.

36. As I have said, HMRC have established that Mr and Mrs Hesketh were in principle liable to the late and the 6-months late penalties because they accepted they were obliged to make the NRCGT returns; HMRC have established that they did so more than 6 months late, although this was not in dispute either. So the question is whether the Tribunal should nevertheless discharge the penalties.

Grounds of appeal

37. Mr Maas put forward very lengthy grounds of appeal. While I have read and considered them in detail, I include only a summary here, and I have put the summary in a different order to that adopted by Mr Maas:

> (a) Ignorance of the law is a reasonable excuse for failure to file because the obligation to file an NRCGT return was more than merely basic law;
>
> (b) HMRC did not warn Mr and Mrs Hesketh of the change in the law;

(c) The appellants had checked their liability on tax when they left the UK years before and it was not reasonable to expect them to know about the new obligation to file an NRCGT return;

(d) It was not the appellants' fault that their advisers did not warn them of the new obligation; their solicitor did not advise them and said it was outside the scope of her instructions; they changed accountants around this time and an email seeking advice was mislaid;

(e) Many other people have made the same mistake because they were not aware of the requirement to file an NRCGT return and that indicates that what the appellants did was reasonable;

(f) Two other tribunals have excused taxpayers liability from these penalties based on ignorance of the law and Tribunals should aim for consistency of approach so the appellants here should also be excused liability;

(g) The appellants have previously had an exemplary tax compliance record

(h) The penalty provisions are unreasonable for NRCGT returns and were not debated in Parliament; HMRC recognised there were potential compliance issues but have not addressed them with this legislation;

(i) HMRC have recognised that daily penalties were not appropriate and that should be treated as an acknowledgement that none of the penalties were appropriate;

(j) HMRC have not adopted a light touch on the introduction of these penalties;

(k) The penalties are disproportionate as there was no tax liability.

38. 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;

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

(c) Or because the penalties lacked proportionality.

So I will consider each of these matters in turn.

Reasonable excuse

39. 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.

40. 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 because (A) insufficiency of funds is not put forward as a reasonable excuse and (B) while there is reference to advice, or at least the lack of advice from third parties (see ground (d)), I find that there was in fact no reliance (see §112 below) so that is not relevant either.

41. 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.
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> (2) for the purposes of sub-paragraph (1) –
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> (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
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> (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.

42. As reasonable excuse is a 'defence' it is not for HMRC to prove that the appellants did not have a reasonable excuse. It is clear that the appellants must prove that thyey did have a reasonable excuse, and that they 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'

43. 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.

44. 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.

45. So it can be seen that some of the grounds of appeal put forward by the appellant cannot amount to a reasonable excuse. Even if the two penalties of £400 are 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 though other Tribunals have discharged similar penalties, that did not cause the failure to file on time and cannot be a reasonable excuse for it; even though their tax compliance record was previously exemplary, it did not cause the late compliance this time. And so on. Whether any of these grounds of appeal amount to special circumstances or indicate lack of proportionality, they cannot be taken into account as a 'reasonable excuse'. So I will only consider those grounds of appeal ((a)-(d)) which may have caused the default as possible reasonable excuses.

What is a 'reasonable excuse'

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

47. 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 often 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.

48. Whether the Judge was correct to do so is highly relevant here because Mr Maas' position is that the appellants here too were quite ignorant of their liability (in this case, to make NRCGT returns) and that they did make them very shortly after discovering their liability to do so.

49. 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 or mental ill-health can be reasonable excuses, but as that is not relevant in this appeal, I discuss it no further).

50. 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.

51. 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".

52. 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 the taxpayer couldn't be expected to know them.

53. 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. The rules should be the same for all, however young or old.

54. Secondly, so far as the question whether inexperience can amount to a reasonable excuse, that seems to me to 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? HMRC say it is not although they do not cite authority in support of that proposition.

Ground (a): Ignorance of the law

55. The appellant in reply to HMRC relied on the cases of *McGreevy* and *Saunders* [2017] UKFTT 765 (TC). I will only consider in detail what was said in *McGreevy* because in *Saunders* the Judge really just approved and adopted what was said in *McGreevy*.

56. The Judge in *McGreevy* 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. His conclusion at §183 that the appellant had a reasonable excuse seems to be because the Judge 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.

57. 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)
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> '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)
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> '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)
>
> '....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. Myself in *Qualapharm* [2016] UKFTT 100 (TC):

58. 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.

59. 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 by *McGreevy*. I have to consider the matter afresh.

Should the rule be limited to criminal cases?

60. In *McGreevy,* the Judge suggested that the principle that ignorance of the law was no defence 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.

61. 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.

62. 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.

63. 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?

64. 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. ...

65. 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.

66. 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.

67. 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 tribunal 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.

68. The decision in *Neal* suggests therefore 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?

69. 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.

70. 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.

71. 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.

72. And in *McGreevy* and *Saunders* the Judges both 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

73. *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.

74. 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?

75. 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?

76. Mr Maas devotes many paragraphs to explaining his view on why ignorance of the law should be a reasonable excuse in this case. He points out that the law applicable in the UK is simply vast. (He might have said this merely in respect to the UK's tax laws). No one can know it all. He suggests a Tribunal should only expect a taxpayer to know the rough outline of his obligations, such as the obligation to make a self-assessment (SA) tax return each year. He considers a Tribunal should not expect a non-resident to be aware of changes in UK law unless HMRC had notified them of them.

77. While he does not refer to the *Neal* case, that case certainly indicates that the rule that ignorance of the law is no defence is not absolute where law is complex and uncertain. Mr Maas would want me to interpret *Neal* so that the exception applied to the obligation to file an NRCGT return.

78. But I am unable to agree. Firstly, 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.

79. 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 either.

80. 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.

81. 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.)

82. 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

83. There was no suggestion that the law in this case was uncertain in its application to Mr and Mrs Hesketh. Mr Maas does not suggest that the law on this was particularly complex (although it appears that the judge in *McGreevy* considered that

it was.) Mr Maas' point seemed to be that there was an awful lot of tax law in this country, so how could an individual be expected to identify the new obligation to file an NRCGT return from the mass of tax law generally?

84. 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 to file their NRCGT returns late.

85. So the reason they did not file their NRCGT returns on time was that they were simply not aware of the requirement. The *Neal* exception for complex, uncertain law is therefore irrelevant because the appellants had made no failed attempt to understand complex or uncertain law: they simply proceeded in ignorance of the filing obligation and did not investigate the position at all. (I will return to one aspect of this at XXX below)

86. 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.

87. 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 XXX 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.

88. 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.

89. The appellants' ignorance of their liability to make NRCGT returns cannot amount to a reasonable excuse. It was the cause of their failure to make timely returns, but it does not excuse their failure. The obligation to file was not complex nor uncertain, nor was any complexity or uncertainty in the law the reason for their failure to file on time. They didn't file on time simply because they were unaware of the obligation to do so. Such ignorance of basic law is not a reasonable excuse.

Ground (b) HMRC's failure to more widely publicise the change in law

90. Mr Maas' complaint is that he considers that HMRC should have told his clients of the change in law. He says HMRC ought to have known from the appellants' previous tax returns that they were non-resident landlords, and that therefore they

might one day sell their UK property and be liable to make a NRCGT return. He says that HMRC could have written to them to warn them of the new filing obligation.

91. 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.

92. Mr Maas considers that that decision was right and that for the same reason the penalties in this appeal should be discharged.

93. As I said at §§43-45 above, for anything to be a reasonable excuse for a failure, it must cause the failure. Yet HMRC's failure to tell the appellants about the change in the law did not cause their ignorance: it merely failed to change it. Mr and Mrs Hesketh were ignorant of the new filing requirement: HMRC did not write to tell them about it so they remained ignorant of it long after the due dates had passed. The failure to write to them did not cause their ignorance and so it could not in law be an excuse for it.

An exception to the rule on ignorance of the law?

94. 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?

95. 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 on this.

HMRC's obligations

96. 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.

97. 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.

98. 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 and telling agents about it but not really doing anything else to draw it to anyone's attention. Whether that is right is rather more debateable.

99. 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 Maas 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.

100. 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 the Hesketh's to warn them of the new NRCGT reporting requirement.

101. And once I have reached the conclusion that HMRC acted lawfully, then it is apparent that there is nothing in the point that Mr Maas 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.

102. So while I accept it is possible that if HMRC had acted unlawfully in failing to write to the Hesketh's then their ignorance of the law might be a reasonable excuse, I do not accept that HMRC did act unlawfully in failing to write to them about the changes. And therefore the Hesketh's ignorance of the law is not a reasonable excuse. I do not consider that *McGreevy* and *Saunders* were correctly decided on this point and I cannot follow them.

103. 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

104. 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.

105. My conclusion is that what was said there 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 or was otherwise in breach of their duty as a public body.

106. Applying that, the appellants' ignorance in this case that their property sale had to be declared 30 days after completion was not a reasonable excuse; compliance with a filing obligation is basic law and in any event their ignorance arose from their 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, HMRC were not acting unlawfully in failing to do so and, further, Parliament cannot have intended the legislation to be read in that manner.

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

108. I can anticipate that Mr Maas and the appellants will feel it unfair that the appeal of taxpayers whose defence was largely identical to theirs should succeed in *McGreevy* and *Saunders*, yet their appeal has failed on the same issue. 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 those appeals were wrongly decided and in conscience cannot follow them.

109. My decision can be appealed and it would be advantageous for future appellants 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 the appellants wish to appeal my decision, they 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.

Ground (c): Absence from UK/passage of time

110. The next matter put forward as a reasonable excuse is that the appellants had been absent from the UK for a long period and it is not reasonable to expect non-residents to keep abreast of legal changes. This is really a subset of grounds (a) and (b) that ignorance of the law is reasonable excuse.

111. I have already in effect dealt with it. The appellants' absence from the UK is no more an excuse for not knowing the law than a resident person would have. The taxpayers retained property in the UK and must obey the UK's laws in respect of it. Their absence from the UK does not excuse ignorance of the law.

Ground (d): Reliance on third parties

112. It appears that the appellants did not rely on third parties. The solicitor who acted for them on the sale did not give them any tax advice at all: when asked why she had not, she said it was outside the scope of her engagement. The appellants do not suggest that they had engaged her to give them advice on the tax implications of their sale and they could not therefore suggest that they reasonably relied on the absence of any advice from her as reassuring them that there was no filing obligation. In fact, they do not suggest that they did rely on it in that way. Either way there is no reasonable excuse, even if reliance on the actions of a third party could be a reasonable excuse.

113. They did apparently email their new accountants of the sale: but Mr Maas' firm did not receive the email. There is no suggestion that Mr and Mrs Hesketh relied on

the absence of a reply as suggesting that they had no compliance obligations: if they had, it would not have been reasonable to do so. If they were seeking advice, they should have ensured they were given it. But they did not chase up a reply and so they did not reasonably rely on anything done, or not done, by their advisers.

114. In other words, there was no reliance on any third party and so it cannot amount to a reasonable excuse.

115. As I have said none of the other grounds of appeal put forward could amount to a reasonable excuse as they did not cause the failure to file on time: I will consider whether they amount to 'special circumstances' or make the penalty disproportionate.

Special circumstances

116. 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 grounds put forward by Mr Mass could be 'special circumstances'.

117. Sch 55 of the FA 2009 gives, in the first instance, HMRC power to reduce penalties for special circumstances, although in Mr and Mrs Hesketh's cases, 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.

118. 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?

119. 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.

120. HMRC did consider special circumstances in their review decision: the review officer concluded that there were none. However, the letter was very oddly worded. She said:

> In reaching my decision I considered the following:
>
> 1. a taxpayer cannot reasonably be expected to know more than the basic law;
>
> 2. it is hard to imagine how, in practical terms, a person living abroad can reasonably be expected to become aware of changes to UK tax legislation;
>
> 3. the penalties are clearly disproportionate in the context that there is no taxable gain on the disposal

121. I do not think that these 3 numbered sentences were intended to reflect the view of the review officer, although that is how the letter reads. If they actually reflected her view, it would seem she thought the appeal should be allowed. As that clearly was not her conclusion, I think that here she was merely listing what the appellants had put forward as grounds of appeal and explaining that she had considered them before rejecting them.

122. However, it does seem to me that the decision is flawed because it is inadequately reasoned. She does not explain why she did not consider the grounds 1-3 amounted to special circumstances. The officer who filed the statement of case attempted to rectify the position, but in my view that is too late. The appealed decision was the review decision.

123. So I find HMRC's decision on special circumstances was flawed and that enables this Tribunal to consider whether to mitigate the penalties on the basis of special circumstances. In order to make a decision on this, I must consider what the legislation means by 'special circumstances'.

Definition of 'special circumstances'

124. There is no test in the legislation but various Tribunals have attempted to give a definition.

125. 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; …"

126. 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."

127. 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.

Grounds (a)-(d) Ignorance of the law and HMRC's failure to remedy such ignorance

128. 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.

129. 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."

130. 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 §§55-89 above.

131. 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 §§90-109.

Ground (d) – the appellants advisers did not warn them of change

132. I have already said at XXX that on the facts the appellants did not rely on their advisers for advice on whether they had reporting liabilities arising out of the sale, so this can be neither a reasonable excuse nor special circumstances.

Ground (e) Other people made the same mistake

133. The appellants produce some evidence in the form of posts on the internet that a number of other taxpayers have made the same error. I don't have any evidence of the exact number of taxpayers who ought to have made a return failed to do so because of their ignorance. I do not think it matters. The point is that Parliament intended taxpayers to acquaint themselves with the law and take steps to obey it: whether one person or many fail to do so does not affect this. It is irrelevant whether large numbers of other persons also made the same mistake: action or inaction is not reasonable simply because many people do (or fail to do) the same. The fact other people have made the same mistake is not a special circumstance and cannot have been intended by Parliament to be a ground on which liability to a penalty could be discharged.

Ground (f): Other tribunal decisions

134. As I have already said, it is clear that two tribunals have decided that ignorance of the law is a reasonable excuse and discharged the penalties on taxpayers in materially similar circumstances to those at issue in this appeal. But that is not a 'special circumstance'. It does not amount to unfairness. If I am right that ignorance of the law is not a reasonable excuse, at least on the facts of this case, it is not unfair that I dismiss the appeal, even if other tribunals have taken a different view. And if I am wrong, the appellants have a remedy because they can appeal my decision.

Ground (g) - Exemplary tax compliance record

135. 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.

Ground (h) the penalty provisions were improperly introduced

136. The claim that the law is unfair is a claim that the penalties lacked proportionality and I deal with that below.

137. Mr Maas also said that (in his opinion) the penalty provisions were nodded through by Parliament without any proper debate and without anyone realising that having the same penalty provisions for NRCGT returns as for SA returns (and many other tax returns) was not (in his view) appropriate. I do not know whether or not Mr Maas is correct in what he says he, but assuming he is, it makes no difference to the outcome of the appeal.

138. I deal with the question of unfairness below: but in so far as Mr Maas is suggesting that the penalty provisions for NRCGT returns are any less a part of the law of this country because they were not (he says) fully debated, he is mistaken. Tribunals no more than taxpayers can pick and choose which laws are obeyed: the provisions were enacted by the Finance Act 2015 and they are a part of the law of this country. If a person is unhappy with what Parliament enacts and how it enacts it, then the only remedy is to seek to lobby Parliament. Not even the Administrative Division of the High Court can take Parliament to task for nodding through legislation without proper consideration of it.

Ground (i) HMRC have removed daily penalties

139. HMRC stated that they have removed all daily penalties in NRCGT cases. They do not state why, although they do say it was in response to representations received.

140. Mr Maas assumes it was because HMRC have recognised it was inappropriate to impose penalties on late submissions of NRCGT returns and therefore the Tribunal should remove all penalties. But as I have already said, unlike HMRC, the Tribunal has no discretion to discharge penalties. It can only discharge penalties in accordance with the law and that means it can discharge those which HMRC cannot show were properly imposed. And it can discharge those for which the taxpayer has a reasonable excuse, or where there are special circumstances (if HMRC's decision was flawed) or if the penalty was not proportionate. But not otherwise.

141. In any event, Mr Maas may well be mistaken in assuming that HMRC removed the daily penalties because they considered it inappropriate to penalise persons who made late NRCGT returns. It seems to me that it is more likely that it was because the daily penalties were improperly imposed: HMRC would not have been able to give the notice of daily penalties required by §4(1)(c) because, until they receive the NRCGT return, HMRC would not know that one was due. But this is pure speculation on my part and irrelevant: the Tribunal has no power to discharge the fixed penalties just because HMRC discharged the daily penalties. And it is not a special circumstance: discharge of the daily penalties does not make it unfair for the taxpayers still to pay the fixed penalties.

Ground (j): HMRC did not have light touch

142. As I have said at §8, I accept that HMRC did operate a light touch on some returns but not on the Hesketh's returns.

143. In any event, in so far this ground of appeal is that Mr Maas thinks that the light touch ought to have been extended to his clients, this is a complaint about HMRC's exercise of discretion. I have no power to judicially review HMRC's decision. If it is a complaint about proportionality, I consider it below. If it is a suggestion that it is special circumstances and unfair that HMRC did not operate a light touch, I reject that: it is not unfair for HMRC to apply the full letter of the law. It is the normal position.

Ground (k): Proportionality

144. 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'

145. 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

146. My inference is that Mr Maas' 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. But as I have already said, I do not accept that HMRC acted unlawfully in failing to notify taxpayers individually of the change on the law. It follows from what I have said above that it is not 'plainly unfair' to expect taxpayers to acquaint themselves with tax law. Nor is there anything in the level of the penalties which is 'plainly unfair'. The penalties start at a low level and increase with time. I see nothing disproportionate in the scheme as a whole.

The penalties in this particular case

147. In this case, no tax is payable, yet Mr and Mrs Hesketh have each been penalised with flat rate penalties amounting to £400. Mr Maas says this is disproportionate.

148. 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 is not, on any view, plainly unfair.

149. I also recognise that each appellant had a £400 penalty imposed on them in respect of the sale of the same property making a total of £800: had only one of them been the owner, the total amount charged would have been only £400. Nevertheless, that does not seem disproportionate to me. The liability to report the sale was a liability that attached to both of the joint owners, in the same way that any income they received from the property would have to have been reported individually by both of them. As they both failed to obey their NRCGT reporting obligations, it is proportionate that both were penalised. (This was not put forward as a special circumstance and I would say that for the same reasons it is no more a special circumstance than it makes the penalty disproportionate).

150. I dismiss the appellants' case that the penalties imposed on them lacked proportionality.

Conclusion

151. For the reasons given above, I dismiss both appeals.

152. 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