TC06623

Appeal number: TC/2017/06681

NON-RESIDENT CAPITAL GAINS TAX – penalties for failing to file a return on time – whether ignorance of the obligation to file the return could amount to a reasonable excuse – yes – appeal upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANN ROWAN-SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

The Tribunal determined the appeal on 23 July 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 5 September 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 December 2017

DECISION

1. This appeal relates to late filing penalties in an aggregate amount of £700 which have been charged under Schedule 55 Finance Act 2009 ("Schedule 55") for the late filing of a Non-Resident Capital Gains Tax ("NRCGT") return in respect of the disposal by the Appellant of a property at Flat 2, 3 Bankwood Drive, Kilsyth, Glasgow, G65 0GZ (the "Property").

The penalties are as follows:

Penalty	**£**
Late filing penalty (paragraph 3 of Schedule 55)	100
6 month late filing penalty (paragraph 5 of Schedule 55)	300
12 month late filing penalty (paragraph 6 of Schedule 55)	300
Total	**700**

The facts

2. There is no dispute between the parties in relation to the relevant facts. The Appellant was the joint owner of the Property along with her husband. At the time of disposing of the Property, she and her husband were resident in Canada and had been so resident for many years. Although she had made no gain in respect of the disposal, the Appellant became obliged to file an NRCGT return in respect of the disposal within 30 days of completing the disposal – ie no later than 27 June 2015. The Appellant did not file an NRCGT return in respect of the disposal of the Property until 29 January 2017.

The law

3. In the Finance Act 2015, and with effect in relation to disposals made on or after 6 April 2015, Parliament introduced Section 12ZB into the Taxes Management Act 1970 (the "TMA 1970") to make non-residents liable to make new returns, i.e. NRCGT returns, as follows:

"(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)."

4. The penalties for failing to make an NRCGT return are contained in Schedule 55.

5. Paragraph 1(1) of Schedule 55 makes a person liable to a penalty if he or she fails to deliver a return of a type specified by the due date. With effect from 26 March 2015, an NRCGT return under Section 12ZB TMA 1970 was added to Schedule 55 by Section 37 and paragraph 59 of Schedule 7 to the Finance Act 2015.

6. Paragraph 3 of Schedule 55 permits the Respondents to impose a £100 penalty on a taxpayer if the return is late; paragraph 5 of Schedule 55 permits the Respondents to impose a penalty which is the higher of 5% of the liability to tax which would have been shown on the relevant return and £300, if the return is more than 6 months late; and paragraph 6 of Schedule 55 permits the Respondents to impose a penalty which is the higher of a specified percentage of the liability to tax which would have been shown on the relevant return and £300, if the return is more than 12 months late.

7. The legislation provides that a taxpayer may be relieved from penalties if he or she can show that there was a "reasonable excuse" for the default. Curiously, there are two potentially applicable "reasonable excuse" provisions in this case, which are not identical. This is because the obligation to file the NRCGT return is set out in the TMA 1970, which contains a relief in cases of reasonable excuse at Section 118(2) TMA 1970, whilst the penalty legislation is set out in Schedule 55, which contains a relief in cases of reasonable excuse at paragraph 23 of Schedule 55.

8. As both of the above provisions appear to be applicable, I have concluded that the Appellant can rely on either of them. If she can establish that she has a reasonable excuse for the purposes of Section 118(2) TMA 1970, then the NRCGT return will be

deemed not to be late (and so liability to the penalties will not arise). If she can establish that she has a reasonable excuse for the purposes of paragraph 23 of Schedule 55, then, although the NRCGT return will remain late, the penalties will be required to be discharged. The end result is the same in either case.

9. The only differences between the two provisions is that paragraph 23 of Schedule 55 specifically refers to the extent to which an insufficiency of funds or reliance on a third party can amount to a reasonable excuse, whereas Section 118(2) TMA 1970 makes no such reference.

10. Section 118(2) TMA 1970 provides as follows:

"For the purposes of this act, the person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

11. Paragraph 23(1) of Schedule 55 provides as follows:

"(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.

(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."

12. So, under both provisions, I am required to consider whether the Appellant had a reasonable excuse for her failure to file the NRCGT return throughout the period between the date when she was required to do so and the date when she did so. In that context, it is expressly provided in one of the provisions but not the other that reliance on a third party is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

13. Paragraph 16 of Schedule 55 provides that, "if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule" and

paragraph 22 of Schedule 55 provides that the exercise of that discretion by the Respondents is open to challenge at the Tribunal if the decision is "flawed" in the light of the principles applicable in proceedings for judicial review. It is clear from the terms of the above provisions that the decision as to whether any particular circumstances constitute "special circumstances" is entirely a matter for the Respondents to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account or otherwise reached a decision that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

The submissions of the parties

14. The Appellant chiefly relies in her appeal on the argument that her failure to be aware of her obligation to file an NRCGT return until very shortly before she belatedly did so is, in the particular circumstances of this case, a reasonable excuse.

15. The Appellant alleges that:

(a) the new regime for requiring the filing of NRCGT returns – which had only recently taken effect when the disposal of the Property was completed - was neither widely known nor widely publicized;

(b) as a non-resident, she is not exposed to UK news or press, much less tax regulations, on a daily basis and she was therefore unaware of the new filing obligation;

(c) the fact that the solicitor who carried out the conveyancing of the Property did not mention the requirement to file the relevant return shows that the new filing obligation could not have been widely known;

(d) it was reasonable for her to rely on the fact that a solicitor who was regularly engaged in conveyancing would have mentioned this to her if the solicitor had known about it. This is because she was entitled to expect that a professional conveyancing solicitor would advise her on her legal obligations in relation to the disposal. In support of the proposition that reliance on professional advisers is a reasonable excuse, she cites various cases such as *Rowland v Revenue and Customs Commissioners* [2006] STC (SPC) 536, *Browne v Revenue and Customs Commissioners* [2010] UKFTT 496 (TC), *Rich v Revenue and Customs Commissioners* [2011] UKFTT 533 (TC) and *Barrett v Revenue and Customs Commissioners* [2015] UKFTT 329 (TC);

(e) she had filed a self-assessment return for many years and knew her obligations in that regard and it was logical for her to assume that the reporting of the disposal would be made in that return, particularly as the disposal had given rise to a loss and therefore had not given rise to a tax liability;

(f) the penalties in question are unfair and disproportionate to the alleged infringement given that there was no tax liability in respect of the disposal; and

(g) if the Tribunal does not consider that the above circumstances amount to a reasonable excuse or that the penalties are unfair and disproportionate, then the Respondents should have concluded that those circumstances are "special circumstances" for the purposes of paragraph 16 of Schedule 55.

16. For their part, the Respondents rely primarily on the principle that ignorance of the law is no excuse and therefore that the Appellant's failure to be aware of her obligation to file the NRCGT return within 30 days of completing her disposal of the Property does not amount to a reasonable excuse. If that were not the case, say the Respondents, then those people who chose deliberately to remain in ignorance of the law would be in a more favourable position as regards the penalty legislation than those people who took steps to know the law and be compliant. It was the responsibility of the Appellant to stay up to date with legislation affecting her activities in the UK.

17. The Respondents add that:

(a) in any event, contrary to the argument made by the Appellant, there was extensive information available to taxpayers, both before and after the change in law, in relation to the new filing obligation. The Respondents refer to an information page placed on the Respondents' website on 6 April 2015 entitled "Capital Gains Tax for Non Residents: UK Residential Property";

(b) paragraph 23 of Schedule 55 expressly precludes reliance on a third party from being a reasonable excuse unless the relevant taxpayer took reasonable care to avoid the failure. The responsibility to file the return remained with the Appellant and therefore, unless the failure of the third party amounts to a reasonable excuse, the Appellant cannot be said to have taken reasonable care to avoid the failure. Filing an NRCGT return "does not require specialist advice that the Appellant has to rely on" and therefore the Appellant's reliance on her solicitor to inform her of that obligation was not a reasonable excuse. In support of the proposition that reliance on a third party does not amount to a reasonable excuse, the Respondents cite the decision in *Stewarton Polo Club Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 668 (TC) and *Westbeach Apparel UK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 561 (TC);

(c) in relation to the allegation that the penalties are unfair and disproportionate to the alleged infringement, the penalties which the Respondents have imposed are an administrative means of encouraging compliance with filing obligations, as opposed to a punishment for failing to pay tax, and therefore the penalties are proportionate to the aim of the relevant legislation; and

(d) in relation to the allegation that the present circumstances are "special circumstances", there is nothing exceptional or uncommon about the present circumstances that would justify any reduction on those grounds.

Discussion

18. It is well accepted that, in penalty cases such as this one, it is for the Respondents to establish that the failure which has given rise to the relevant penalties has occurred and that the taxpayer has been notified of the penalties in the appropriate form and then, once they have done so, it is for the taxpayer to establish that she has a reasonable excuse for her failure or that the penalties are unfair and disproportionate or that Respondents were wrong to conclude that the relevant circumstances were not special circumstances.

19. For reasons of brevity, I will not describe all of the conditions which need to be satisfied in order for the penalties in this case to have arisen because it is clear from the papers that the Appellant accepts that those conditions have been met.

20. Similarly, the Appellant has not argued that she did not receive notice of the penalties in the proper form. In relation to this point, I should just observe that the relevant penalty notice in this case is deficient in two respects. First, it does not state that the initial £100 penalty was being imposed in respect of the tax year ending 5 April 2016. It should have done so because Section 12ZB(7) TMA 1970 expressly states that an NRCGT return "relates to" the tax year in which any gains on the relevant disposal would accrue and paragraph 18(1)(c) of Schedule 55 requires a penalty notice to state the period in respect of which the penalty is assessed, which, in the case of a penalty under paragraph 3 of Schedule 55, is the tax year of assessment to which the penalty relates (see the Court of Appeal decision in *Donaldson v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2511). Secondly, there is a minor typographical error in the notice in that the third penalty is described as being imposed under paragraph 5 of Schedule 55 when, in fact, it was being imposed under paragraph 6 of Schedule 55. However, I am satisfied that both of those errors fall within the tolerance for which Section 114(1) TMA 1970 provides when it says:

"An assessment, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

21. The above means that it is then necessary for me to consider whether the Appellant has established that she should be relieved from the penalties in question because she had a reasonable excuse for her failure or because the penalties are unfair and disproportionate or because the Respondents' decision that the relevant circumstances were not special circumstances is "flawed" in the *Wednesbury* sense.

22. In relation to the first of these issues – ie whether or not the Appellant had a reasonable excuse - I would start by noting that this case is just one of a number of similar cases involving a failure to file an NRCGT return because of ignorance of the obligation to do so. In many of those cases, there has been an extensive discussion on whether or not ignorance of the law can amount to a reasonable excuse.

23. I am aware of at least two cases in which I was not involved where the taxpayer's appeal has succeeded on the basis that his or her ignorance of the obligation to file the NRCGT return amounted to a reasonable excuse – the decision of Judge Thomas in *McGreevy v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 690 (TC) and the decision of Judge Connell in *Saunders v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 765 (TC) ("*Saunders*"). In addition, I have held to that effect myself in two recent cases – *Julie Wickenden v The Commissioners for Her Majesty's Revenue and Customs* (TC/2018/01340) and *David Wickenden v The Commissioners for Her Majesty's Revenue and Customs* (TC/2018/01351).

24. On the other hand, there are at least four cases where the opposite conclusion has been reached – the decisions of Judge Mosedale in *Hesketh v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 871 (TC) ("*Hesketh*") and *Welland v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 870 (TC), the decision of Judge Brannan in *Hart v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 207 and the decision of Mr Sheppard in *Jackson v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 64 (TC) ("*Jackson*").

25. Of course, all of these decisions are decisions of the First-tier Tribunal and are not binding upon me. It is open to me to depart from any of them if I conclude that I should do so.

26. In terms of authorities which might be binding on me, Judge Mosedale in *Hesketh* refers to two decisions which could potentially be relevant in this context - the High Court decision in *Neal v The Commissioners for Her Majesty's Revenue and Customs* [1998] STC 131 and the Court of Appeal decision in *Financial Services Limited (formerly the Securities and Investments Board) v Scandex and another* [1997] Lexis Citation 4758 ("*Scandex*").

27. In the former case, although finding that, on the facts before him, the taxpayer's ignorance of the law did not amount to a reasonable excuse, Simon Brown J held that there could be circumstances in which that might be the case, citing with approval the decision in *Geary v The Commissioners for Her Majesty's Revenue and Customs* [1987] VTD 2314, where that had been the case.

28. The Court of Appeal decision in *Scandex* does not, as such, relate to the question of whether ignorance of the law can be a reasonable excuse for the purposes of the tax legislation. Instead, the matter at issue in that case was whether a belief on the part of a person concerned in the carrying on by a company of an investment business in the United Kingdom that the company was authorised under the law of a country which was a member of the EEA to carry on investment business in that country afforded him an arguable defence to an allegation that he had been "knowingly concerned" in a contravention of Section 3 of the Financial Services Act 1986. It was held that "knowingly" in that context meant knowing the facts giving rise to the contravention in question, as opposed to knowing that there was a contravention, because ignorance of the law was no excuse. I do not believe that this decision by the Court of Appeal in the context of a different question under different legislation precludes me from finding that there are circumstances in which ignorance of the law can amount to a reasonable excuse for a default under the tax legislation.

29. In each of the First-tier Tribunal cases cited above other than the two cases in which I was involved, the debate centred on the extent of the principle that ignorance of the law is no excuse. For example, Judge Thomas was of the view that the relevant principle was confined to criminal law and did not apply to civil law, whereas Judge Mosedale reached the opposite view, although noting that there are examples of limitations on the principle in the case of law which is highly complex or uncertain.

30. For my own part, I prefer not to focus at all on the question of whether or not there is a principle which precludes ignorance of the law from being a reasonable excuse and, if there is, the extent of any exceptions to that principle but rather on the question of whether, in this particular case, the fact that the Appellant was unaware of the obligation to file the NRCGT return until shortly before she actually did so met the objective standard required in order to amount to a reasonable excuse.

31. In approaching the question in that way, I am relying on the well-established definition of what amounts to a reasonable excuse, as laid down by Judge Medd in *The Clean Car Company Limited v The Commissioners of Customs and Excise* [1991] VATTR 234 ("*Clean Car*") and a passage in the recent decision of the Upper Tribunal in *Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 (TC) ("*Perrin*").

32. In *Clean Car*, Judge Medd stated as follows:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. 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? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

33. The Upper Tribunal in *Perrin* made the following observation at paragraph [82] in the decision about how this test should be applied in a case where the excuse given by the appellant is that he or she was unaware of the requirement of law which has been breached:

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

34. It can be seen from this passage that the Upper Tribunal considers that, in determining whether a taxpayer has a reasonable excuse, there is no separate and distinct principle to be applied in cases where the taxpayer seeks to rely on his or her ignorance of the law. Instead, it is simply necessary to determine in such cases, as in all other reasonable excuse cases, whether it was objectively reasonable for the taxpayer to have failed to discharge the obligation that has given rise to the default. That objective test is the one to which Judge Berner in *Barrett v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 329 referred, when he said the following, at paragraph [154] :

> "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".

35. So, in accordance with the above passages, I need to ask myself whether, in the particular circumstances of this case, the failure by the Appellant to file an NRCGT return in relation to her disposal of the Property until the time she did so was reasonable, for this purpose asking myself whether a hypothetical responsible person, conscious of and intending to comply with her obligations regarding tax but having the experience and other relevant attributes of the Appellant and placed in the situation in which the Appellant found herself at the relevant time, might similarly have been unaware of the obligation to file the relevant return.

36. When the test is expressed in that way, it becomes clear that, by definition, it is not possible to prescribe exhaustively all of the circumstances in which ignorance of the law can amount to a reasonable excuse because each case will turn on its own distinct facts. So, whilst it might well be the case that ignorance of legislation that is complex or uncertain amounts to a reasonable excuse, there may well be other circumstances where ignorance of the law can amount to a reasonable excuse.

37. Turning then to the application of the above test in the context of the facts in this appeal, my view is that the Appellant's failure to file the NRCGT return before she did so was reasonable, given the circumstances of this case. This is, first, because there was no reason for the Appellant to have suspected that, in addition to reporting the disposal in her normal self-assessment return in respect of the relevant tax year of assessment, she would also need to make another, separate and self-standing, tax return in relation to the disposal. And, therefore, there was no reason why the Appellant should have gone onto the Respondents' website to look for the existence of any such additional filing obligation. Moreover, there was no reason why the Appellant should have sought the advice of a tax expert in relation to the disposal, given that it was obvious to her from the numbers involved that the disposal had not given rise to a chargeable gain and so she would be able to deal with the disposal perfectly adequately in her self-assessment return without recourse to expert advice. For those two reasons, I believe that a hypothetical responsible person, who was cognizant of her obligations in relation to tax and intended to comply with those obligations, might very well have acted in the same way as the Appellant.

38. I would add that, although the Appellant did not say so expressly in her submissions (and neither party has made anything of the issue as to whether or not the Appellant's excuse continued throughout the period ending shortly before she filed the NRCGT return), the date on which she filed her NRCGT return – 29 January 2017 – fell just two days before the filing deadline for her self-assessment return in respect of the tax year of assessment in which the disposal of the Property was completed – the tax year of assessment ending 5 April 2016. I have inferred from that timing that the Appellant must have discovered her failure to file the NRCGT return in the course of preparing the relevant self-assessment return and therefore only shortly before she filed the NRCGT return. For that reason, I believe that her reasonable excuse continued until shortly before she filed the NRCGT return.

39. It is implicit in the above conclusion that, in my view, the Respondents did not accord as much publicity to this new filing requirement as, in retrospect, they might now be wishing. I say this because it is apparent from the number of appeals that have arisen in relation to this requirement that the introduction of the requirement did not come to the attention of a considerable number of the general body of persons to whom it was relevant.

40. In saying this, I am not saying that the Respondents have acted unlawfully or in breach of their duties to taxpayers in failing to publicize the new filing requirement sufficiently. I am merely saying that, in assessing whether or not the Appellant's lack of awareness was a reasonable excuse, I must inevitably take into account the extent to which the relevant information was available to, and known by, the general body of persons to whom it was relevant and, in my view, the evidence suggests that the existence of this requirement was not as widely known as would ideally have been the case.

41. In that regard, I have noted the comments made by Judge Connell in *Saunders* to the following effect at paragraph [68]:

> "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 para 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)."

42. I am not sure that I would go as far as Judge Connell has done in *Saunders,* in saying that the Respondents should have written to everyone that was registered as a non-resident landlord in order to inform them that this new filing requirement had been enacted but it seems to me that, given the relative obscurity of the requirement in question, more publicity could have been given to its introduction and that it is this which has prompted the volume of appeals which have now occurred. The fact that the Appellant's solicitor, who, although not a tax expert, was familiar with conveyancing, appears to have been unaware of the new filing obligation tends to support this conclusion.

43. In that context, I would, for my own part, distinguish between awareness of the change in law which involved the introduction of NRCGT and awareness of the change in law which involved the new filing obligation in relation to NRCGT. I do not think that a failure to be aware of the existence of NRCGT would amount to a reasonable excuse because the introduction of the tax was heavily trailed. But a taxpayer who became aware of his or her obligation to pay NRCGT on any relevant gain as a result of that publicity might very reasonably believe that that tax would be collected in the same way as capital gains tax in general and that therefore his or her self-assessment return would be the appropriate place to report any disposal which was relevant to NRCGT. So, in my view, a failure to be aware of the obligation to file the NRCGT return within 30 days of completing the relevant disposal was reasonable even though a failure to be aware of the obligation to pay NRCGT would not have been.

44. For completeness in relation to the reasonable excuse issue, I should add that, although Section 118(2) TMA 1970 does not contain the language which appears in paragraph 23 of Schedule 55, to the effect that reliance on a third party can be a reasonable excuse for a taxpayer only if the taxpayer took reasonable care to avoid the failure, I believe that the two provisions should be applied in exactly the same way in that regard. In other words, I would apply Section 118(2) TMA 1970 on the basis that, unless the taxpayer in question took reasonable care to avoid the failure in question, his or her reliance on the third party would not amount to a reasonable excuse.

45. And, in this case, were it not for my conclusion that the Appellant's ignorance of the obligation to file the relevant return amounts to a reasonable excuse in and of itself, I would not have been inclined to conclude that the Appellant's reliance on her conveyancing solicitor to inform her of the relevant obligation met the standard of reasonable care. This is because, whilst the fact that the Appellant's conveyancing solicitor appears not to have been aware of the new filing obligation tends to support the proposition that insufficient publicity was given to the obligation – after all, one would expect a conveyancing solicitor to be aware in general terms of the tax obligations associated with conveyancing – I do not myself consider that a taxpayer who relies on a conveyancing solicitor to apprise her of, or to fulfil her responsibilities under, the tax legislation has a reasonable excuse simply by virtue of that reliance. Tax legislation is complex and is for that reason generally the subject of specialist advice. So, if the solicitor in question had been a tax specialist, then the Appellant's reliance argument would have had more substance. As it is, I do not think that the Appellant's reliance on her conveyancing solicitor to point out a new tax-related filing obligation is, in and of itself, a reasonable excuse. However, I do think that, nevertheless, for the reasons set out above, the Appellant had a reasonable excuse for her failure to be aware of the filing obligation until shortly before she filed the NRCGT return.

46. For that reason, I have concluded that her appeal should be allowed.

47. In view of the conclusion which I have reached above in relation to the main ground of appeal, it is unnecessary for me to reach any conclusions in this decision in relation to the alternative arguments which the Appellant has raised. However, I would observe in passing that:

> (a) in relation to the question of whether the penalties are unfair and disproportionate, it is not clear to me that it is appropriate to consider the proportionality of a penalty which has been imposed for a compliance failure by comparing the quantum of the penalty to the amount of tax which would have become payable pursuant to the return in question. (In this regard, I agree with the reasoning set out in the judgment of Judge Mosedale in *Hesketh* at paragraph [148]); and
>
> (b) as noted above, I am not permitted to reach my own view on whether these circumstances amount to special circumstances. I am merely permitted to consider whether the Respondents' conclusion that they are not is unreasonable in the sense set out in *Wednesbury*. I do not

think that the Respondents' conclusion in that regard can be said to be unreasonable in that sense.

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2018