



TC06329

Appeal number: TC/2015/05341

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*INCOME TAX – Whether reasonable excuse for late submission of non-resident capital gains tax returns – No. Whether special circumstances - No in respect of the first penalty – yes, in respect of later penalties
Whether 6 month and 12 month penalties have been levied in accordance with legislation – No. Appeal allowed in respect of them*

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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ALAN LESLIE JACKSON

Appellant

- and -

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

Respondent

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**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB
CTA AIT**

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The Tribunal determined the appeal on 28 November 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 6 July 2017, and HMRC's undated Statement of Case received by the Tribunal on 14 September 2017 with enclosures. The Tribunal wrote to the appellant on 14 September 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. A reply dated 3 October 2017 was received and considered by the Tribunal.

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DECISION

1. Introduction

5 The appellant's Notice of Appeal states that it is an appeal against penalties totalling £1,400 for the late submission of two Non-resident capital gains tax returns. The penalties originally totalled £3,200 and included daily penalties totalling £1,800. HMRC used their discretion to reduce these daily penalties to nil leaving £1,400 outstanding.

2. Legislation

10 Finance Act 2009 Schedules 55 and 56.
Finance Act 2015 Section 37 and Schedule 7
Taxes Management Act 1970, in particular Sections 8(1) and 12ZB

Section 8 (1) of the Taxes Management Act 1970 provides:

15 For the purposes of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax during that year,] he may be required by a notice given to him by an officer of the Board-

20 (a) To make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) To deliver with the return such accounts, statements and documents, relating to information contained in the return as may reasonably be so required.

25 3. The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

The Finance Act 2015, s 37 Schedule 7 amended the Taxes Management Act 1970 with effect from 6 April 2015 with the insertion of Section 12ZB of the Taxes Management Act 1970 which provides:

30 (1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and Customs, on or before the filing date, a return in respect of the disposal.

(2) In subsection (1) the appropriate person means---

(a) The taxable person in relation to the disposal, or

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

(3) A return under this section is called an "NRCGT return"

(4) An NRCGT return must-

(a) contain the information prescribed by HMRC, and

(b) include a declaration by the person making it that the return is to the best of the person's knowledge correct and complete.

(5) Subsection (1) does not apply to a non-resident CGT disposal to which section 188C of the 1992 Act applies (transfers within NRCGT group).

5 (6) For the purposes of subsection (2)(b) the "relevant members" of the NRCGT group are-

(a) the companies which are members of that group when the disposal is made, and

(b) any other companies which are, at any time before the time of the disposal in the tax year to which the return relates, members of that group.

10 (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.

15 Schedule 55 of the Finance Act 2009 ("the Schedule") makes provision for the imposition by HMRC of penalties on taxpayers for the late filing of tax returns.

Paragraph 1 (1) to (3) of the Schedule state

1 (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the table below on or before the filing date.

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(2) Paragraphs (2) to (13) set out-

(a) The circumstances in which a penalty is payable, and

(b) Subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this schedule P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17 (3))

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The Table referred to in paragraph 1 (1) above gives details of the tax and returns to which the penalties relate. The Finance Act 2015, s 37 Schedule 7 inserted item 2A to the Table. Item 2A refers to Capital gains tax and NRCGT returns under Section 12ZB of the Taxes Management Act 1970'

30 If P fails to file a return included in the table by the "penalty date" (the day after the "filing date" i.e. the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

Paragraph 4 of the Schedule provides:

35 "(1) A person is liable to a penalty under this paragraph if (and only if)-

(a) The failure continues after the end of the period of 3 months beginning with the penalty date,

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

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

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

Paragraph 5 of the Schedule provides

a. A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

10 b. The penalty under this paragraph is the greater of –

i. 5% of any liability to tax which would have been shown in the return in question, and

ii. £300

Paragraph 6 of the Schedule provides

15 A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 12 months beginning with the penalty date.

c. The penalty under this paragraph is the greater of –

i. 5% of any liability to tax which would have been shown in the return in question, and

20 ii. £300

Schedule 55 paragraph 17 of The Finance act 2009 states:

25 “17(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to “any other penalty” does not include—

30 (a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).

(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed 100% of the liability to tax.”

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4. Case law

Rowland v HMRC (2006) STC (SCD 536)

Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967

5 International Transport Roth GmbH v SSHD [2002] EWCA Civ 158

Keith Donaldson v HMRC [2016] EWCA Civ 761

HMRC v Hok Ltd. [2012]UKUT 363 (TCC)

Garnmoss Ltd. trading as Parham Builders [2012]UKFTT 315 (TC)

Christopher Ryan v HMRC [2012] UKUT 9 (TCC)

10 The Clean Car Co. Ltd. v Commissioners of Customs and Excise [1991] BVC 568

Rachel McGreevy v HMRC [2017] UKFTT 690 (TC)

Robert Clive Welland v HMRC [2017] UKFTT 870 (TC)

David and Jennifer Hesketh [2017] UKFTT 871 (TC)

15 5. Facts

The appellant left the UK in January 2013 and took up residence in the Isle of Man.

With effect from 6 April 2015 the UK law on capital gains tax was amended so that sales by a Non-resident of property in the UK have to be advised to HMRC within 30 days of the sale. They also have to be included in the annual tax return normally due by
20 31 October following the end of the tax year in which the sale was made assuming a paper return was to be made. If the return was submitted electronically an additional 3 months was allowed so that an electronic return had to be submitted by 31 January in the year following the end of the tax year.

In previous tax years such sales only had to be included in the annual tax return, the
25 due dates for which were in normal circumstances the same as is set out above.

On 18 May 2015 the appellant disposed of his property in Hunts Cross Avenue, Liverpool.

On 1 September 2015 the appellant disposed of his property in St. Mary's Court, Liverpool.

30 6. A non-resident capital gains tax (NRCGT) return was made by the appellant in respect of both properties. It was received by HMRC on 2 October 2016. This showed that no capital gain had been made on either property and no capital gains tax was due.

7. As an NRCGT return in respect of the Hunts Cross Avenue property was not submitted by the filing date of 17 June 2015 in accordance with paragraph 3 of
35 Schedule 55 of the Finance Act 2009 HMRC issued a notice of penalty assessment on 21 November 2016 in the amount of £100.

8. As the return had still not been received 3 months after the penalty date of 17 June 2015,(that is by 17 September 2015).in accordance with paragraph 4 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £900 on 21
40 November 2016, calculated at £10 per day for 90 days.

9. As the return had still not been received 6 months after the penalty date of 17 June 2015, in accordance with paragraph 5 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £300 on 21 November 2016.

5 10. As the return had still not been received 12 months after the penalty date of 17 June 2015, in accordance with paragraph 6 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £300 on 21 November 2016.

10 11. As an NRCGT return in respect of the St.Mary's Court property was not submitted by the filing date of 1 October 2015 in accordance with paragraph 3 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of penalty assessment on 21 November 2016 in the amount of £100.

12. As the return had still not been received 3 months after the penalty date of 1 October 2015, (that is by 1 January 2016).in accordance with paragraph 4 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £900 on 21 November 2016, calculated at £10 per day for 90 days.

15 13. As the return had still not been received 6 months after the penalty date of 1 October 2015, in accordance with paragraph 5 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £300 on 21 November 2016.

20 14. As the return had still not been received 12 months after the penalty date of 1 October 2015, in accordance with paragraph 6 of Schedule 55 of the Finance Act 2009 HMRC issued a notice of daily penalty assessment of £300 on 21 November 2016.

15. Thus having sent in his NRCGT returns for the two properties on 2 October 2016 the appellant received from HMRC eight penalty notices totalling £3,200 all dated 21 November 2016.

25 16. HMRC's statement of case includes the following paragraphs on the subject of daily penalties:

30 "I have recently been advised a review has taken place regarding the issue of daily penalties for late Non-Resident Capital Gains Tax returns (NRCGT), which are raised at HMRC's discretion. I can advise the position has changed following a review of representations from a number of customers and agents. I can confirm that HMRC will no longer be issuing daily penalties for late NRCGT returns and all daily penalties raised for NRCGT are being withdrawn.

35 Therefore, on this basis, I have cancelled the proportion of this penalty that arose from the daily penalties. The amount to pay was £3,200 and following the cancellation of £1,800, the total amount to pay is £1,400. The fixed penalties of £200 (2 x £100) and the 6 months late and 12 months penalties totalling £1,200 (4 x £300), the raising of which HMRC submits it does not have power to exercise discretion, remain due and payable and if this has not been paid, interest will be running on these amounts"

Similar wording was also used in HMRC's letter to the appellant dated 9 June 2017 giving the conclusion of their review of the matter.

17. It is therefore the remaining penalties totalling £1,400 which are now the subject of this appeal.

5 **18. The appellant's submissions**

The appellant accepts that the returns were submitted late. He had missed the changes made in UK law with effect from 6 April 2015 relating to the 30 day submission deadline for notifying sale of UK property by a non-resident.

10 He was aware that under the previous law he was required to advise the sales of the properties on his annual tax return in what he understood was the normal way to submit such tax information that is electronically by 31 January 2017. It was his intention to comply and to this end he visited his accountant in October 2016 for the purpose of discussing his annual tax return due by 31 January 2017. It was on this visit that he became aware of the change in law and therefore immediately completed the required
15 form which was received by HMRC on 2 October 2016.

The appellant considers that the penalties raised are out of proportion to the omission and take no account of his compliance in all previous years.

19. HMRC's submissions

20 Some of HMRC's submissions are included in the paragraphs above. In addition HMRC draw attention to the terms of Section 12ZB TMA 1970 and say that in respect of the disposal of both properties returns were not submitted within 30 days of each disposal and therefore penalties are due.

20. HMRC say the penalties were determined in accordance with Paragraphs 1, 3,4,5,and 6 of Schedule 55 Finance Act 2009

25 21. HMRC contends that the new legislation was announced in the Chancellors Autumn statement in December 2014. This was followed up by Capital Gains Tax for Non Residents:UK residential property which was published at www.gov.uk/ hmrc on 6 April 2015 that is more than 5 weeks before the appellant's first disposal.

30 22. HMRC contends that the appellant had an obligation to stay up to date with legislation affecting his activities in the United Kingdom. On the sale of his UK properties HMRC say they expected the appellant, acting as a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts, to have researched what is expected regarding his tax obligations. They say that page 2 of Capital Gains Tax for Non Residents: UK
35 Residential Property very clearly states that the deadline for reporting a disposal is 30 days.

23. HMRC contends that the appellant did not take care to avoid the failure to ensure that the NRCGT returns were filed within the statutory 30 day time limit.

24. In respect of reasonable excuse HMRC say consider the appellant does not have a reasonable excuse for the late submission of the returns. They say there is no statutory definition of “reasonable excuse”. They refer to the decision in *Rowland* which states that reasonable excuse “is a matter to be considered in the light of all the circumstances of the particular case.”

25. HMRC’s view is that the actions of a taxpayer should be considered from the perspective of a prudent person exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Taxes Acts. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

The Tribunal notes that this is submission is similar to the comments made by Judge Medd in the case of *The Clean Car Co. Ltd, v HMRC*

He wrote “*the test of whether or not there is a reasonable excuse is an objective one.... 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.*”

26. In respect of the penalty being unfair HMRC say for a penalty to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the Court of Appeal decision in *International Transport Roth GmbH*. HMRC say that the penalties are not plainly unfair and that the provisions include reasonable excuse and special circumstances which allow mitigation in appropriate cases.

27. HMRC has considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*). HMRC say that in considering special circumstances they took into account that the appellant owes no capital gains tax and that this was a one off oversight due to changes in legislation. However they consider that there are no special circumstances which would allow them to reduce the penalty.

28. Before completing this decision the Tribunal became aware of three recent and relevant First-tier Tribunal decisions. These cases are *Rachel McGreevy* which was decided by Judge Richard Thomas; and *Robert Clive Welland*; and *David and Jennifer Hesketh*, both of which were decided by Judge Barbara Mosedale. Although the Tribunal is not bound by these decisions they are informative.

29. In the former case Judge Thomas considers the penalties imposed by HMRC for the failure of Rachel McGreevy, a resident of New South Wales, Australia to notify HMRC of the sale of her UK property in Orpington within a period of 30 days from the completion of the sale.

Judge Thomas finds that it is not proved that the disposal occurred in the 2015-2016 tax year and that on the balance of probabilities the disposal occurred in the previous tax year, therefore no return was due to be made within 30 days and penalties should not have been levied.

5 Judge Thomas considers that ignorance of the law can in some circumstances provide a reasonable excuse. He considers at length what information was made available to taxpayers on the introduction of changes to the requirement to notify HMRC of disposals of property by Non-residents. At paragraph 165 of the decision he states

10 “165. The first item containing details about the NRCGT return and the deadlines for it is in the FAQs published in March 2015 followed up on 6 April by the document HMRC refer to in their SoC. They expect that all those non-residents who own residential property in the UK to familiarise themselves with this documentation, but do not explain how the average taxpayer, not a tax professional or conveyancing solicitor could expect to
15 know about the existence of the webpages, let alone find them.”

Judge Thomas concludes that the appellant had reasonable excuse for not submitting her NRCGT return on time.

20 Judge Thomas states that there is some excuse for the policymaking failures. He says “*There was no Committee Stage in the Finance Bill 2015 because of the election, and there had been as far as I can tell no exposure of draft clauses before the Bill was introduced. Had there been such exposure or a Committee Stage, there would have been some time for objections to be made to s 12ZB and for amendments to be tabled. On that basis the penalties in the case were not in accordance with the real
25 compliance intention and so there were special circumstances.*”

He therefore concludes that HMRC’s decision that there were no special circumstances was flawed.

30 30. In the decision of *Welland*, Judge Mosedale had the benefit of the *McGreevy* decision but disagrees with it. Mr. Welland a resident of Thailand owned three properties in the UK all of which he sold in the tax year but there was no capital gains tax due.

35 Judge Mosedale considers that in general ignorance of the law cannot constitute a reasonable excuse. However she makes comment about the system of penalties being designed so that a penalty has the effect of educating a taxpayer so that future penalties are avoided. She considered that three properties were sold before any penalties were issued so that the appellant had no opportunity to learn from his non-compliance in respect of the first disposal.

40 This Judge Mosedale considered was unusual and therefore she judged that special circumstances existed and that only the penalty for the first failure should stand and the penalties for the failures in respect of the second and third sales should be reduced to nil.

31. In the *Hesketh* case only one property was sold. Judge Mosedale therefore following her reasoning in *McGreevy* finds that there was no reasonable excuse for the failure nor were there any special circumstances so she dismissed the appeal.

5 **32. Tribunal's Observations**

It is accepted by the appellant that he filed the returns late.

HMRC say they have used their discretion and have cancelled the daily penalties. The Tribunal considers that that statement hides the fact that HMRC were unable to comply with the conditions specified in paragraph 4 of Schedule 55 in particular the notice could not specify the date from which the penalty is payable and therefore was likely to be unenforceable.

The Tribunal has therefore to determine the following;

1. Whether HMRC have correctly addressed and notified the penalties.
2. Whether HMRC have applied the penalty legislation correctly and calculated the amount of the penalties correctly.
3. Whether the appellant has a reasonable excuse for his failure to submit the returns on time.
4. Whether there are special circumstances which would allow HMRC to reduce the penalty and whether in the Tribunal's opinion HMRC's decision on special circumstances is flawed.
5. Whether the penalties are disproportionate, harsh or unfair.

33. Whether HMRC have correctly addressed and notified the penalty

No copy of any of the penalty notices was included in the bundle of papers provided. The only evidence of the penalties is a copy of HMRC's own internal record showing that penalty notices were issued. However it is clear from the correspondence that the appellant received the penalty notices and therefore the Tribunal finds that on the balance of probabilities HMRC did correctly address and notify the penalty to the appellant.

34. Whether HMRC have applied the penalty legislation correctly and calculated the penalty correctly.

An NRCGT return in respect of the property at Hunts Cross Avenue was due to be submitted by 17 June 2015, but was submitted late on 2 October 2016.

An NRCGT return in respect of the property at St. Mary's Court was due to be submitted by 1 October 2015, but was submitted late on 2 October 2016.

For each late return HMRC levied penalties of £700 total £1,400.

Paragraph 3 of Schedule 55 imposes a fixed penalty of £100 if a return is submitted late. This is a fixed penalty with no reference to the amount of tax due.

5 The Tribunal finds that in respect of the penalty of £100 for each property sold in the tax period HMRC have applied the legislation correctly, and calculated the penalty correctly. Therefore the two £100 penalties are due and payable unless the appellant has reasonable excuse for the failure or there are special circumstances to be taken into consideration.

10 HMRC say that as the returns had not been received 6 months after the penalty date in accordance with paragraph 5 of Schedule 55 of the Finance Act 2009 they issued notices of penalty assessment of £300.

HMRC also say that as the returns had still not been received 12 months after the penalty date in accordance with paragraph 6 of Schedule 55 of the Finance Act 2009 they issued notices of penalty assessment of £300.

15 The legislation which applies to the penalties to be assessed under both paragraphs 5 and 6 of Schedule 55 which are set out above contains the following wording:-

- a. The penalty under this paragraph is the greater of –
 - i. 5% of any liability to tax which would have been shown in the return in question, and
 - ii. £300

20 The Tribunal notes that each of these penalties is determined after reference to the amount of tax due. It is agreed that in respect of the sales of each property no capital gains tax is due. Therefore in determining which was the greater under sub paragraph (i) HMRC considered 5% of a nil liability to tax is nil, and under sub-paragraph (ii) the amount is £300. Therefore HMRC assessed the appellant with the greater amount of
25 £300. They did this twice for each of the two properties so assessed 4 penalties of £300. The Tribunal observes that in making each of these 4 calculations HMRC had to make reference to the appellant's liability to tax.

30 The Tribunal considers that in making the 4 assessments of £300 HMRC have overlooked the provisions of paragraphs 1(3) and 17 (3) of Schedule 55. Paragraph 17(3) states:

(3)Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed 100% of the liability to tax.

35 It is clear that the appellant was liable to a penalty under more than one paragraph of Schedule 55 namely paragraphs (3),(4),(5), and (6) albeit HMRC have cancelled or withdrawn the daily penalty described in paragraph (4), see paragraph 15. above. The penalties under paragraphs (5) and (6) for each disposal were all notified to the appellant by HMRC on the same day, 21 November 2016, so HMRC must have been

aware for each disposal that they had notified more than one penalty determined by reference to a liability to tax.

It is accepted that the tax liability for each disposal is nil. 100% of a nil liability to tax is nil. Therefore the aggregate of the penalties determined by a liability to tax must not exceed nil. The Tribunal has therefore applied this provision and concludes that none of the four penalties of £300 should have been assessed.

35. Whether the appellant has a reasonable excuse for his failure to submit the returns on time.

In respect of the two £100 fixed penalties the Tribunal has considered whether the appellant has a reasonable excuse for the delay as referred to in Paragraph 23(1) Schedule 55 Finance Act 2009.

The Tribunal has considered carefully the points made by the appellant and his agent. These include that the appellant's intention was to comply with tax legislation but he was totally unaware of the change in legislation concerning NRCGT returns which occurred only 5 weeks before the first disposal. It was when he met his accountant to make preparations for submission of his annual tax return which he thought would include details of the disposals that he was advised that he should have submitted returns 30 days after the disposals.

In the case of *Garnmoss Ltd trading as Parham Builders* the Tribunal observed at paragraph 12

“What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”

The Tribunal considers that in this case there was no muddle or confusion. However there was a mistake, it was a mistake of omission due to the appellant being totally unaware of the change in law.

The Tribunal has considered Judge Medd's comments in *The Clean Car Co. Ltd* case. This was a VAT Tribunal hearing so he was considering what was reasonable for a VAT registered trader.

We are satisfied in this case that the appellant did intend to comply with his obligations as to tax but was totally unaware of the change in legislation. However the Tribunal does not consider that being ignorant of the law provides the appellant with a reasonable excuse for the late return. In the case of *Welland* at paragraphs 65 to 96 inclusive Judge Mosedale considers in depth whether ignorance of the law can provide a reasonable excuse and concludes that it cannot. In respect of this case The Tribunal agrees with and follows that reasoning.

In most sales of property a solicitor or other legal adviser is appointed by the vendor. In this case no mention is made of such an appointment or any legal advice being obtained.

Whilst legislation provides that reliance on another cannot be regarded as a reasonable excuse, nevertheless if a legal adviser was involved it is to be expected that his responsibility to his client would include advice on the need to complete a NRCGT return.

5 **36. Whether there are special circumstances which would allow HMRC to reduce the penalty and whether in the Tribunal's opinion HMRC's decision on special circumstances is flawed.**

Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances.
10 HMRC have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded there are none. In *Welland* Judge Mosedale considered that the appellant had been given no opportunity to correct his behaviour in that in one tax year he sold three properties and incurred three sets of penalties before he learned that he was required to submit a return within 30 days of
15 disposal of a property. Judge Mosedale states at paragraphs 135 to 138 of *Welland*.

“Three penalties in a row

.135. *Although Mr Welland did not raise this as a ground of appeal, it is obvious that the penalties amount to £1,800 because he sold three properties in one tax year: had he sold two of the properties in a later tax year he would no
20 doubt have learned from bitter experience that an NRCGT return had to be made 30 days after completion. Mr Welland was unable to learn from his mistakes, as he was late filing all three returns before he learned of his filing obligation.*

136. *Does the fact Mr Welland sold three properties in one tax year amount to special circumstances?*

25 137. *Taking into account the principles explained in Warren, I find that the circumstances are unusual but not unique. Can it be said it is significantly unfair for Mr Welland to bear the whole penalty? A taxpayer selling a single valuable property who failed to make the return would be penalised once; Mr Welland, selling three not so valuable properties, was penalised three
30 times. And it is clear he did learn from his mistakes: he filed as soon as he realised his mistake and avoided the 12 months penalty on the last of the three sales.*

35 138. *I think that does amount to special circumstances, particularly in circumstances (which is not in dispute) where the taxpayer has previously had a good compliance record. Parliament, while intending to penalise non-compliance, must have intended taxpayers to learn from their non-compliance. Because of the three sales in quick succession, Mr Welland was unable to do so. I consider that the penalties should be reduced so that only the penalty on the first sale in tax year 15/16 should be payable. In other words, I
40 reduce the penalty to £700.”*

In this case the appellant sold two properties and following submission of the required NRCGT return late he received on one day eight penalties totalling £3,200. HMRC subsequently withdrew the daily penalties of £1,800. The Tribunal has found that the six month and 12 month penalties should not have been levied.

- 5 In respect of special circumstances the Tribunal has decided to follow the judgement of Judge Mosedale in *Welland* and reduce the second of these penalties to nil because the appellant had been given no opportunity to learn from his non-compliance.

37. Whether the penalties are disproportionate, harsh or unfair.

- 10 In respect of whether the level of the penalties is disproportionate to the offence, harsh and unfair the Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power to amend them unless they are incorrectly imposed or they are inaccurately calculated.

In *HMRC v Hok Ltd* the Upper Tribunal at paragraph 36 said

- 15 “...*The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal*
20 *has no statutory power to discharge, or adjust, a penalty because of the perception that it is unfair.*”

- 25 38. With regard to the sale of his property in Hunts Cross Avenue Liverpool the appellant has not established a reasonable excuse for the late submission of his Non-resident capital gains tax return. HMRC has applied the late filing penalty of £100 in accordance with legislation. HMRC consider that there are no special circumstances that gave rise to the late submission and the Tribunal does not consider that HMRC’s decision on that is flawed. Therefore the appellant’s appeal against the penalty is dismissed.

- 30 39. With regard to the sale of his property in St. Mary’s Court, Liverpool the appellant has not established a reasonable excuse for the late submission of his Non-resident capital gains tax return in respect of that property. HMRC has applied the late filing penalty of £100 in accordance with legislation. However HMRC consider that there are no special circumstances that gave rise to the late submission and the Tribunal considers that HMRC’s decision on that is flawed. It must be unusual for an appellant to receive
35 eight penalties on one day in respect of two failures. The fact that all the penalties were issued on the same day clearly gave the appellant no opportunity to correct his behaviour or learn from his first mistake. It is clear that the system of penalties is designed in such a way as to progressively penalise a taxpayer until he rectifies his error. Eight penalties in one day denied the appellant that opportunity. Therefore the
40 Tribunal has decided there were special circumstances and reduces the penalty to nil.

40. In respect of the two 6 month penalties and the two 12 month penalties being four penalties each of £300 HMRC have not applied these in accordance with legislation and therefore the appeal is allowed in respect of all of them.

5 41. 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
10 and forms part of this decision notice.

PETER R. SHEPPARD
TRIBUNAL JUDGE

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RELEASE DATE: 8 FEBRUARY 2018