[2018] UKFTT 368 (TC)

TC06582

Appeal number: TC/2017/05443 & 05444

CAPITAL GAINS TAX – non-resident CGT return – penalty of £100 for failure to file return within 30 days of completion of house sale – whether error in notice of assessment as to period in paragraph 18(1)(c) Schedule 55 FA 2009 makes assessment invalid: no, s 114(1) TMA applies – whether date of disposal correctly shown on return: no - whether HMRC have shown penalty due: yes - whether reliance on third party reasonable excuse: yes – whether ignorance of law reasonable excuse: yes, following* Perrin *in Upper Tribunal – whether UK/Canada DTA applies - appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALISON BRADSHAW & RICHARD BRADSHAW **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal considered the appeals on 11 June 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 Notices of Appeal dated 11 July 2017 (with enclosures) and HMRC's Statements of Case (with enclosures) acknowledged by the Tribunal on 12 December 2017. The Tribunal also received post-hearing submissions from the appellants on 12 June 2018.

DECISION

1. What I considered on 11 June were two separate appeals by each of Mr & Mrs Bradshaw ("the appellants"), who are husband and wife, and whose appeals related to the failure by them to make a return of the disposal by them of their joint interest in a residential property in the United Kingdom, they both being not resident in the United Kingdom in the year in which the disposal occurred.

2. Apart from a few very minor differences in the dates of correspondence between each of the appellants and the respondent ("HMRC") the facts in the two appeals are identical. There is a minor difference in the legal issues referred to at the appropriate place below.

3. It therefore seemed to me to be a sensible course to give a single decision in relation to both appeals. To the extent necessary I direct that this be done under the powers in Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

4. The penalties under appeal are for the tax year 2015-16 and are said in HMRC's statements of case ("SoCs") in each appeal to total £700 for the failures by the appellants to make and deliver a non-resident capital gains tax ("NRCGT") return until a date 450 days after the due date. The failures are those of Mrs Alison Bradshaw and Mr Richard Bradshaw ("the appellants").

The facts

5. I take the facts from the SoCs filed by the respondents ("HMRC") and from the documents attached to the SoCs. But because it might be of particular relevance to the appeals, I directed that the appellants provider me with further factual information about the transaction which seemed to give rise to the obligation to make a return. I received the information and have incorporated it in the decision which I have made.

6. On 20 October 2016 the appellants each delivered an NRCGT return to HMRC in electronic form. The printout of the return entries in the bundles shows:

(1) the appellant's address for correspondence in Mississauga, Ontario, Canada,

(2) each appellant says they emigrated to Canada in 2004,

(3) the disposal of a property in Cranbrook Road, Bristol, UK,

(4) the date of conveyance was 29 June 2015,

(5) no election was made for an alternative method of computation,

(6) a claim for private residence relief was made, showing the date the property was (in fact ceased to be) the only or main residence as 20 July 2004,

(7) Mrs Bradshaw, but not Mr Bradshaw, is registered for self-assessment,

(8) the computation showed no gain and no loss, and

(9) the amount of CGT due was nil.

7. On 2 and 5 December 2016 HMRC (NRCGT) wrote to each of the appellants. The letters were headed "Non-resident Capital Gains Tax (NRCGT)". The next lines in bold type were "Late filing penalties" and "These penalties total: £1600".

8. After salutations and listing the address of the property in the UK in §4(2), the letters continued (verbatim):

> "I have received a NRCGT return from you relating to the disposal of the above property on 29/06/2015.
>
> This property was subject to NRCGT and, you were required to file an NRCGT return within 30 days of the sale being finalised which was 29/07/2015.
>
> We did not receive this return until 20/10/2016.
>
> This is a notice of assessment for a late filing penalty under Schedule 55 of the Finance Act 2009."

9. The penalties charged were £100 for the initial failure to file by the due date, £900 in daily penalties for 90 days from 30/07/2016, £300 for being 6 months late and £300 for being 12 months late.

10. Appeal rights were then described, that an appeal must be made in writing by 30 days of the date of the notice. The letters were unsigned.

11. On 15 December 2016 the appellants wrote to HMRC appealing against the penalty. They said that at the time of writing they had not received the penalty notice.

12. On 8 and 17 March 2017 a person calling themselves NRCGT Team replied to each of the appellants at their address in Canada. The letters informed the appellants that HMRC did not agree that they had a reasonable excuse for the late filing. The letter went on to explain what HMRC consider to be a reasonable excuse. It said that a reasonable excuse will only apply "when an unexpected or unusual event, either unforeseeable or beyond your control, has prevented you from sending your return in on time".

13. An explanation of the appellants' right to provide further information, request a review or to ask the tribunal to decide the matter was given.

14. On 11 April 2017 both appellants asked for a review on Form SA634.

15. On 1 June 2017 Ms T J Storey wrote to each of the appellants with the conclusions of the review. Her conclusion, having conducted her review, was to uphold the penalty. She informed the appellants what their rights were and what would happen if they did nothing.

16. On 10 and 11 July 2017 the appellants notified the tribunal of their appeals. On 7 December 2017 HMRC served their SoCs.

Law

17. I set out first the law as to filing returns that applies to a non-resident with UK sources of taxable income or chargeable gains.

18. This is in s 8 Taxes Management Act 1970 ("TMA"), as it is for residents, which provides as follows:

> **"8 Personal return**
>
> (1) For the purpose 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 for that year, he may be required by a notice given to him by an officer of the Board—
>
> (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.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source …
>
> …
>
> (1D) A return under this section for a year of assessment (Year 1) must be delivered—
>
> (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
>
> (b) in the case of an electronic return, on or before 31st January in Year 2.
>
> …
>
> (3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.
>
> (4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person."

19. There are special pages for non-residents that fall within the scope of s 8(4). Section 8(1) has therefore always been apt to require a non-resident to return information for the purposes of capital gains tax[1].

20. As to NRCGT returns, TMA provides a rather more complex picture:

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

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[1] Since the original enactment of capital gains tax ("CGT") in 1965 a non-resident individual has been liable to CGT on gains on assets forming part of or used for a branch or agency in the UK of a trade. (The Taxation of Chargeable Gains Act 1992 ("TCGA") has not been updated to refer to a permanent establishment, and still refers to s 82 Taxes Management Act repealed in 1995). A non-resident has also been taxable to CGT since 1973 on the disposal of exploration or exploitation rights and assets and unlisted shares deriving their value from such rights (but not from such assets) – s 276 TCGA.

(2) In subsection (1) the "appropriate person" means—

(a) the taxable person in relation to the disposal, …

…

(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.

(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).

12ZBA Elective NRCGT return

(1) A person is not required to make and deliver an NRCGT return under section 12ZB(1), but may do so, in circumstances to which this section applies.

(2) The circumstances to which this section applies are where the disposal referred to in section 12ZB(1) is—

(a) a disposal on or after 6 April 2015 where, by virtue of any of the no gain/no loss provisions, neither a gain nor a loss accrues, or

(b) the grant of a lease on or after 6 April 2015 which is—

(i) for no premium,

(ii) to a person who is not connected with the grantor, and

(iii) under a bargain made at arm's length.

(3) For the purposes of subsection (2)—

"connected" is to be construed in accordance with section 286 of the 1992 Act;

"no gain/no loss provisions" has the meaning given by section 288(3A) of the 1992 Act;

"lease" and premium" have the meanings given by paragraph 10 of Schedule 8 to the 1992 Act.

…

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

…

12ZE NRCGT return to include advance self-assessment

(1) An NRCGT return ("the current return") relating to a tax year ("year Y") which a person ("P") is required to make in respect of one or more non-resident CGT disposals ("the current disposals") must include an assessment (an "advance self-assessment") of—

(a) the amount notionally chargeable at the filing date for the current return (see section 12ZF),

….

But see the exceptions in section 12ZG.

12ZF The "amount notionally chargeable"

(1) The "amount notionally chargeable" at the filing date for an NRCGT return ("the current return") is the amount of capital gains tax to which the person whose return it is ("P") would be chargeable under section 14D … of the 1992 Act for the year to which the return relates ("year Y"), as determined—

(a) on the assumption in subsection (2),

(b) in accordance with subsection (3), and

(c) if P is an individual, on the basis of a reasonable estimate of the matters set out in subsection (4).

(2) The assumption mentioned in subsection (1)(a) is that in year Y no NRCGT gain or loss accrues to P on any disposal the completion of which occurs after the day of the completion of the disposals to which the return relates ("day X").

(3) In the determination of the amount notionally chargeable—

(a) all allowable losses accruing to P in year Y on disposals of assets the completion of which occurs on or before day X which are available to be deducted under paragraph (a) or (b) of section 14D(2) or (as the case may be) section 188D(2) of the 1992 Act are to be so deducted, and

(b) any other relief or allowance relating to capital gains tax which is required to be given in P's case is to be taken into account, so far as the relief would be available on the assumption in subsection (2).

(4) The matters mentioned in subsection (1)(c) are—

(a) whether or not income tax will be chargeable at the higher rate or the dividend upper rate in respect of P's income for year Y (see section 4(4) of the 1992 Act), and

(b) (if P estimates that income tax will not be chargeable as mentioned in paragraph (a)) what P's Step 3 income will be for year Y.

(5) An advance self-assessment must, in particular, give particulars of any estimate made for the purposes of subsection (1)(c).

(6) A reasonable estimate included in an NRCGT return in accordance with subsection (5) is not regarded as inaccurate for the purposes of Schedule 24 to the Finance Act 2007 (penalties for errors).

(8) For the purposes of this section—

an estimate is "reasonable" if it is made on a basis that is fair and reasonable, having regard to the circumstances in which it is made;

"Step 3 income", in relation to an individual, has the same meaning as in section 4 of the 1992 Act.

…

(10) Section 989 of ITA 2007 (the definitions) applies for the purposes of this section as it applies for income tax purposes.

(11) For the meaning of "NRCGT gain" and "NRCGT loss" see section 57B of, and Schedule 4ZZB to, the 1992 Act.

12ZG Cases where advance self-assessment not required

(1) Where a person ("P") is required to make and deliver an NRCGT return relating to a tax year ("year Y"), section 12ZE(1) (requirement to include advance self-assessment in return) does not apply if condition A, B or C is met.

(2) Condition A is that P … has been given, on or before the day on which the NRCGT return is required to be delivered, a notice under section 8 or 8A with respect to—

(a) year Y, or

(b) the previous tax year,

and that notice has not been withdrawn.

…

12ZH NRCGT returns and annual self-assessment: section 8

(1) This section applies where a person ("P") … —

(a) is not required to give a notice under section 7 with respect to a tax year ("year X"), and

(b) would be required to give such a notice in the absence of section 7A (which removes that duty in certain cases where the person has made an NRCGT return that includes an advance self-assessment).

(2) In this section, "the relevant NRCGT return" means—

(a) the NRCGT return by virtue of which P is not required to give a notice under section 7 with respect to year X, or

(b) if more than one NRCGT return falls within paragraph (a), the one relating to the disposal which has the latest completion date.

(3) P is treated for the purposes of the Taxes Acts as having been required to make and deliver to an officer of Revenue and Customs a return under section 8 for the purpose of establishing, with respect to year X, the matters mentioned in section 8(1).

(4) For the purposes of subsection (3), section 8 is to be read as if subsections (1E) to (1G) of that section were omitted.

(5) If P does not give a notice under subsection (6) before 31 January in the tax year after year X, the Taxes Acts have effect, from that date, as if the advance self-assessment contained in the relevant NRCGT return were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(6) If P gives HMRC a notice under this subsection specifying an NRCGT return which—

(a) relates to year X, and

(b) contains an advance self-assessment,

the Taxes Acts are to have effect, from the effective date of the notice, as if that advance self-assessment were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(7) References in the Taxes Acts to a return under section 8 (for example, references to amending, or enquiring into, a return under that section) are to be read in accordance with subsections (5) and (6).

(8) A notice under subsection (6)—

(a) must be given before 31 January in the tax year after year X;

(b) must state that P considers the advance self-assessment in question to be an accurate self-assessment in respect of year X for the purposes of section 9.

(9) The "effective date" of a notice under subsection (6) is—

(a) the day on which the NRCGT return specified in the notice is delivered, or

(b) if later, the day on which the notice is given.

(10) The self-assessment which subsection (5) or (6) treats as having been made by P is referred to in this section as the "section 9 self-assessment".

(11) If P—

(a) gives a notice under subsection (6), and

(b) makes and delivers a subsequent NRCGT return relating to year X which contains an advance self-assessment,

that advance self-assessment is to be treated as amending the section 9 self-assessment.

(12) For the purposes of subsection (11), an NRCGT return made and delivered by P ("return B") is "subsequent" to an NRCGT return to which P's notice under subsection (6) relates ("the notified return") if the day of the completion of the disposal to which return B relates is later than the day of the completion of the disposal to which the notified return relates."

21. The differences in the application of the law to the appellants referred to in §2 derives from the point at §6(7). In the case of Mrs Bradshaw, sections 12ZE and 12ZF

TMA do not apply, whereas in the case of Mr Bradshaw they apply, but s 12ZH does not.

22. The provisions of Schedule 55 Finance Act ("FA") 2009 imposing penalties for late returns will be familiar to many likely readers of this decision so I have put them in an Appendix.

Grounds of appeal and HMRC response

23. The appellants' grounds of appeal cover four areas. That which is within the Tribunal's jurisdiction is that the appellants had a reasonable excuse for their failure. On this they say:

(1) they reported the sale as soon as they found out about the new law, which Mrs Bradshaw did when completing her UK income tax return for 2015-16. This was an unusual law change that changed a principle that has applied for decades and potentially impacts people living anywhere in the world. The new law implemented a wholly new additional reporting requirement with an unusual timeframe to report within 30 days instead of the usual self-assessment reporting schedule.

(2) The solicitor handling the conveyancing did not know about the new law, and Agent Update 51 which HMRC had referred to was issued 5 months after the conveyancing date.

(3) Data published by HMRC showing that 36% of NRCGT filings were late shows it was insufficiently publicised.

(4) They have returned the disposal on their Canadian tax returns.

24. Putting these in terms of the safeguards in the legislation:

(1) Items (1) and (3) are saying that the appellants' ignorance of the law was a reasonable excuse because of HMRC's failure to publicise the change.

(2) Item (2) is a claim that the appellants relied on a third party which gave him a reasonable excuse

(3) Item (4) could be taken as a claim that the UK/Canada double taxation treaty exempts the gain or removes the reporting requirement.

25. HMRC's contentions as set out in the SoCs consist of 38 unnumbered paragraphs, many of which are repetitious, disordered and where they refer to the Chancellor's Autumn Statement of December 2013 and similar documents, ludicrous. In essence they say:

(1) Ignorance of the law is not a reasonable excuse

(2) Reliance cannot be placed on a third party as the appellants did not take reasonable care to ensure the returns were filed.

(3) HMRC's decision on special circumstances, that there were none, is not flawed.

Reasons for decision

The issues and the burden of proof

26. There are two main issues in these as in most penalty cases. The first is whether the penalty was correctly and validly imposed in accordance with any requirements of the law. The second arises if the penalty was correctly imposed and is whether there is any provision in the law that allows the person assessed to argue that the penalty should not have been imposed at all (or in a lesser amount).

27. HMRC rightly recognise that it is for them to show that the penalty was correctly imposed and that it is for the appellant to show that there is a reason why the penalty should not have been imposed.

Was the penalty correctly imposed?

28. In my opinion HMRC have to show, on the balance of probabilities, that:

(1) the obligation which the appellants failed to meet fell within the Table in paragraph 1 Schedule 55 FA 2009 at the time of the failure.

(2) each appellant failed to meet that obligation by the date required (and if relevant any later date).

(3) the appellants were not excepted from the obligation by any provision of law (apart from one requiring a claim).

(4) any assessment was made and was within the time limit laid down by law.

(5) notice of the assessments were given to the appellants.

(6) those notices stated the period in respect of which the penalty was assessed.

(7) those notices explained the appellants' appeal rights.

29. The only one of these points put in question by the appellants was that in §28(5), whether the notice had been properly served. In their initial appeals to HMRC they said that they had not at that time received the notices in the post (they say they became aware of them from emails from HMRC which are not in the bundle).

30. They have never subsequently stated that they did receive them. On the other hand they have not suggested in subsequent correspondence or the Notices of Appeal to the Tribunal that they did not receive them. They have demonstrated however that the post takes a long time to reach them and that letters from HMRC after the appeals did reach them. In the absence of any challenge on the point I find that the notices were served.

31. However I had noticed that in their returns the appellants had each said that not only was the "date of conveyance (ie legal transfer of title)" 29 June 2015, so was the "date of disposal (eg date sold/given away)". In every one of the NRCGT return penalty cases I have seen there has been the same coincidence of days for these two boxes on the NRCGT return. The obligation in s 12ZB Taxation of Chargeable Gains Act 1992 ("TCGA") is one to make a return of a "non-resident CGT disposal", and that is defined in s 14B TCGA relevantly as follows:

"(1) For the purposes of this Act a disposal made by a person is a "non-resident CGT disposal" if—

(a) it is a disposal of a UK residential property interest (within the meaning given by Schedule B1), and

(b) condition A … is met.

But see also subsections (5) and (6).

(2) Condition A is—

(a) in the case of an individual, that the individual is not resident in the United Kingdom for the tax year in question (see subsection (3)),

…

(3) In subsection (2)—

(a) "the tax year in question" means the tax year in which any gain on the disposal accrues (or would accrue were there to be such a gain);

…

…"

32. There is no doubt that what was disposed of by the appellants was a residential property interest within the meaning given by Schedule B1 TCGA and that they were not resident in the UK for 2015-16. But paragraph 11 Schedule 7 FA 2015 inserted s 14B into TCGA with effect in relation to disposals made on or after 6 April 2015. For the purposes of TCGA, a disposal takes place when an unconditional contract for the disposal is made, and not the date of completion if later (s 28 TCGA). Thus if the contract was made on a date before 6 April 2015 there was no non-resident CGT disposal irrespective of whether the completion was after that date. If there was no non-resident CGT disposal there was no obligation to make a return. Accordingly I directed that the appellants should inform me of the date that contracts were exchanged.

33. The reply was that contracts were exchanged before 29 June 2015. The appellants did not know the exact date, but thought it was after 5 April 2015. As a result of this reply I am satisfied that there was a NRCGT disposal.

34. On this point I simply observe that it seems to me that the question on the NRCGT return that asks for the "date of disposal" and gives as examples the "date of sale, gift etc." is likely to be misinterpreted by taxpayers completing the return. I have looked in vain for any guidance from HMRC on the relevant website pages (which they are so insistent that a taxpayer should consult) as to what answer the question actually requires, but since there is a box immediately afterwards asking for the date of completion it cannot be asking for that. The date of disposal for the purposes of TCGA which in most cases is the date of the contract is clearly the most likely answer, as that may affect the rate of tax on the gain, and where there is a change in CGT law from one tax year to the next may affect the computation of any gain. And as in this case if completion was shortly after the commencement date of the legislation, the correct answer to the question about the date of disposal may determine whether a penalty is

due or not. At the very least HMRC should make it clearer on the return what the date to be entered is.

35. In relation to the other points I considered them in some depth in the case of *Eric Scowcroft v HMRC* [2018] UKFTT 295 TC at [39] to [126]. What I said in that case in relation to the evidence provided by HMRC applies to these cases, *mutatis mutandis*. I therefore accept that the assessments to penalties of £100, £300 and £400 were validly made and notice properly given.

36. As to the vanishing paragraph 4 penalties see below at §§50 to 52.

The effect of the UK-Canada double taxation agreement

37. Article 13 of the Convention between the Government of the United Kingdom and Canada brought into effect in UK law by the Double Taxation Relief (Taxes on Income) (Canada) Order 1980 (SI 1980/709) ("DTA") says:

> "Article 13
>
> Capital gains
>
> 1 Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.
>
> …
>
> 5 Gains from the alienation of
>
> …
>
> (b) an interest in a partnership or trust the assets of which consist principally of immovable property situated in a Contracting State …,
>
> may be taxed in that State.
>
> 6 The provisions of paragraph 5 of this Article shall not apply—
>
> …
>
> (b) in the case of an interest in a partnership or trust, where immediately before the alienation of the interest, the alienator was entitled to, or the alienator and any persons related to or connected with him were entitled to, an interest of less than 10 per cent of the income and capital of the partnership or trust.
>
> 7 For the purposes of paragraph 5 of this Article—
>
> …
>
> (b) the term "immovable property" does not include any property (other than rental property) in which the business of the company, partnership or trust was carried on.
>
> 8 Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3, 4 and 5 of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

> 9 The provisions of paragraph 8 of this Article shall not affect the right of a Contracting State to levy according to its law a tax on or in respect of gains from the alienation of any property on a person who is a resident of that State at any time during the fiscal year in which the property is alienated, or has been so resident at any time during the six years immediately preceding the alienation of the property.
>
> 10 Where an individual ceases to be a resident of a Contracting State and by reason thereof is treated under the laws of that State as having alienated property before ceasing to be a resident of that State and is taxed in that State accordingly and at any time thereafter becomes a resident of the other Contracting State, the other Contracting State may tax gains in respect of the property only to the extent that such gains had not accrued while the individual was a resident of the first-mentioned State. However, this provision shall not apply to property, any gain from which that other State could have taxed in accordance with the provisions of this Article, other than this paragraph, if the individual had realized the gain before becoming a resident of that other State. The competent authorities of the Contracting States may consult to determine the application of this paragraph."

38. From this it can be seen that a resident of Canada (which the appellants say they are) who derives gains from the alienation (ie disposal) of immovable property (ie land including buildings) in the United Kingdom may be taxed in the United Kingdom. In the appellants' cases I do not know whether they derived a gain or not from the disposal of the house in Bristol, because they claimed private residence relief. But if they had derived a gain, the effect of the DTA would have been to allow the UK to tax any gain that fell within domestic law.

39. I left art 5(b) in the text above because it might be argued that as holders jointly of the house in Bristol, presumably as tenants in common or joint tenants, there may be said to be an interest in a trust involved, rather than immovable property, but the result is the same, as any trust would have as its principal asset immovable property.

40. Article 9 shows that Canada has the right to tax any gain as well. If both contracting parties tax the gain then the provisions of art 21 (elimination of double taxation) would come into play and under art 21(1)(a) Canada would give credit for any UK tax.

41. None of this however affects the UK's right to require a return of information about a non-resident's disposal of land in the UK, nor to require a computation of any tax arising from a disposal, unless some other article of the DTA applies.

42. Article 22 is about non-discrimination. Paragraph (1) says:

> "(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected."

43. I have no information to suggest whether the appellant is a national of Canada. And I observe that the requirement which is more burdensome has to be more burdensome than a requirement on UK nationals. The NRCGT return is a burden placed on non-residents which is more burdensome than that placed on UK residents, although the UK residents concerned will include many non-nationals.

44. The commentary on Article 24 of the OECD's Model Double Taxation Convention concerning non-discrimination states:

> "1. This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, the Article should not be unduly extended to cover so-called 'indirect' discrimination. For example, whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality such as a different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State, *it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality for purposes of that paragraph.*" [My emphasis]

45. The commentary goes on (at paragraph 7) to point out that a non-resident and a resident of a given state are not "in the same circumstances" as each other.

46. I conclude that there is nothing in the DTA that can help the appellants.

Did the appellant have a reasonable excuse?

47. Ignorance of the law can be a reasonable excuse – see the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) at [82]. In the case of NRCGT returns of non-resident CGT disposals I have held in more than one case that such ignorance can be a reasonable excuse – see *McGreevy v HMRC* [2017] UKFTT 690 (TC) and *Scowcroft v HMRC* [2018] UKFTT 295 In these cases I find that it is for the reasons I have given in those cases.

48. The appellants were also entitled to rely on a third party unless they did not take reasonable care to avoid the failures. They relied on their solicitor, something which was wholly reasonable in the circumstances so that that reliance is also a reasonable excuse.

Special circumstances

49. I do not need to address this issue.

The vanishing paragraph 4 penalties

50. Penalties of £900 were assessed on the appellants (see §§7 and 9). In the review letter of 1 June 2017 Ms Storey says:

"**Daily penalties**

On a further note, 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 HMRC will no longer be issuing daily penalties for late NRCGT returns *and all daily penalties raised for NRCGT are being withdrawn.*

Therefore on this basis, I have cancelled the proportion of this penalty that arose from daily penalties. … The fixed penalties of £100, £300 and £300, the raising of which HMRC does not have power to exercise discretion (*sic*), remain due and payable …"

51. I have addressed this issue in *David Gater v HMRC* (TC/2017/06528) and need not repeat what I said there. The upshot of my consideration of the issue in that case was that because of the inability of HMRC to cancel the daily penalty in that case, I treated the notification of the appeals to the Tribunal as including the daily penalty. This was not to cast doubt on HMRC's intentions not to enforce the daily penalty, but it seemed to me better that the matter should be put beyond any doubt.

52. I am therefore by this decision also cancelling the daily penalties as well as the other penalties.

Decision

53. Under paragraph 22(1) Schedule 55 FA 2009 in the case of Mrs Alison Bradshaw I cancel the penalties of £100, £900, £300 and £300.

54. Under paragraph 22(1) Schedule 55 FA 2009 in the case of Mr Richard Bradshaw I cancel the penalties of £100, £900, £300 and £300.

55. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 06 JULY 2018

APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

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.

(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.

…

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	*Return or other document*
…	…	…
2A	Capital gains tax	NRCGT return under section 12ZB of TMA 1970
…	…	…

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

4—(1) P is liable to a penalty under this paragraph if (and only if)—

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

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

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

(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).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

SPECIAL REDUCTION

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

INTERACTION WITH OTHER PENALTIES AND LATE PAYMENT SURCHARGES

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—

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

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

…

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

23—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.