[2018] UKFTT 455 (TC)

TC06633

Appeal number: TC/2017/06258

CAPITAL GAINS TAX – non-resident CGT return – penalties of £1,300 for failure to file return within 30 days of completion of house sale - whether HMRC have shown penalty due: yes – whether fact that residence status in year of disposal not yet ascertained relevant: no – s 12ZJ TMA applies - whether reliance on third party reasonable excuse: yes – whether ignorance of law reasonable excuse: yes, following* Perrin *in Upper Tribunal – whether paragraph 4 daily penalties purportedly withdrawn remain outstanding - appeal allowed against all penalties, including daily penalties.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID GATER **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal 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 Notice of Appeal dated 16 August 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 December 2017.

DECISION

1. The penalties under appeal are for the tax year 2015-16 and are said to total £400 for failure to make and deliver a non-resident capital gains tax ("NRCGT") return until 252 days after the due date. The failure is that of Mr David Gater ("the appellant").

The facts

2. I take the facts from the statement of case ("SoC") filed by the respondents ("HMRC") and from the documents attached to the SoC.

3. On 5 January 2017 the appellant delivered an NRCGT return to HMRC in electronic form. The printout of the return entries in the bundle shows:

(1) the appellant's address for correspondence in Endon, Stoke-on-Trent, Staffordshire, ST9,

(2) the disposal of a property in Newcastle under Lyme, Staffordshire,

(3) the date of conveyance was 31 March 2016,

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

(5) he was registered for self-assessment,

(6) the computation showed a gain of £0, and

(7) the amount of CGT due was nil.

4. On 1 February 2017 HMRC (NRCGT) wrote to the appellant. The letter was headed "Non-resident Capital Gains Tax (NRCGT)". The next lines in bold type were "Late filing penalties" and "These penalties total: £1300.00".

5. After salutations and listing the address of a property in the UK (in postcode area ST5), the letter continued:

> "I have received an NRCGT return from you relating to the disposal of the above property on 31/03/2016.
>
> This property was subject to NRCGT and, (*sic*) you were required to file an NRCGT return within 30 days of the sale being finalised which was 30/04/2016.
>
> We did not receive this return until 05/01/2017.
>
> This is a notice of assessment for (*sic*) a late filing penalty (*sic*) under Schedule 55 of (*sic*) the Finance Act 2009."

6. 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 and £300 for being 6 months late.

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

8. On 21 February 2017 the appellant's agent, Howsons, Chartered Accountants, wrote to HMRC appealing against the penalty.

9. On 27 May 2017 a person calling themselves NRCGT Team replied to the appellant at an address in Egypt. The letter did not suggest that the reply had been copied to Howsons. It informed the appellant that HMRC did not agree that he 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".

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

11. On 1 June 2017 the appellant's agent asked for a review on Form SA634.

12. On 17 July 2017 Ms T J Storey wrote to the appellant with the conclusions of the review. Her conclusion having conducted her review was to uphold the penalty. She informed the appellant what his rights were and what would happen if he did nothing. This reply was copied to Howsons.

13. On 16 August 2017 the appellant notified the tribunal of his appeal. On 6 December 2017 HMRC served their SoC.

Law

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

15. 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."

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

17. 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).

[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 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.

(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."

18. 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

19. The appellant's grounds of appeal are extensive. Those points that are within the Tribunal's jurisdiction are:

(1) The lack of publicity about significant change in legislation.

(2) His solicitor, the first point of contact for what is essentially a transactional return, was unaware of the requirement to file.

(3) His NRCGT return was filed as soon as his accountant was made aware of the disposal during preparation of his tax return for 2015-16 in January 2017.

(4) There was no period of grace for the first year, unlike with CIS, RTI etc.

(5) There was no direct communication from HMRC based on his completion of non-residence pages and rental pages for 2014-15.

(6) Although there was an expectation for his non-resident status to apply to 2015/16 as in previous years, this was not a foregone conclusion until facts for year are determined by agent.

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

(1) Items (1) and (5) are saying that the appellant's 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 appellant relied on a third party which gave him a reasonable excuse

(3) Item (3) forestalls any HMRC argument that any reasonable excuse ceased too long before the return was filed.

(4) Item (6) is an argument that non-resident status was not established at the due date.

(5) Item (4) goes arguably to the question of special circumstances.

21. HMRC's contentions as set out in the SoC consist of 34 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 appellant 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.

Discussion

The issues and the burden of proof

22. There are two main issues in this, 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).

23. 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?

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

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

(2) the appellant was the person who failed to meet that obligation required by law by the date required (and if relevant any later date).

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

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

(5) notice of the assessment was given to the appellant.

(6) that notice stated the period in respect of which the penalty was assessed.

(7) that notice explained the appellant's appeal rights.

25. The only of these points put in question by the appellant (in §19(6)) was whether he had the obligation described in §24(1) given that his residence status was uncertain at the time the return was due. Section 12ZJ Taxes Management Act 1970 applies in relation to this uncertainty:

> "(1) For the purposes of sections 12ZA to 12ZI, the question whether or not a disposal of a UK residential property interest is a non-resident CGT disposal is to be determined in accordance with subsections (2) and (3).
>
> (2) A non-residence condition is to be taken to be met in relation to a disposal of a UK residential property interest if, at the time of the completion of the disposal--
>
> (a) it is uncertain whether or not that condition will be met, but
>
> (b) it is reasonable to expect that that condition will be met.
>
> (3) If (in a case within subsection (2)) it later becomes certain that neither of the non-residence conditions is met in relation to the disposal, the disposal is treated as not being, and as never having been, a non-resident CGT disposal (and any necessary repayments or adjustments are to be made accordingly).
>
> (4) Subsection (5) applies if--
>
> (a) at the time of the completion of the disposal of a UK residential property interest it is uncertain whether or not the disposal is a non-resident CGT disposal because it is uncertain whether or not a non-residence condition will be met, but the case does not fall within subsection (2), and
>
> (b) it later becomes certain that a non-residence condition is met in relation to the disposal.
>
> (5) For the purposes of this Act, the filing date for the NRCGT return is taken to be the 30th day following the day on which it becomes certain that a non-residence condition is met in relation to the disposal.
>
> (6) In this section "a non-residence condition" means condition A or B in section 14B of the 1992 Act."

26. This shows that if, as he says his status was uncertain at the time of making the disposal (which it inevitably was) it was in my view reasonable to expect (given the facts as to his residence status in the papers) that he would be found to be non-resident.

27. I would however have expected HMRC to mention this issue and show what facts demonstrate such a reasonable expectation.

28. In relation to the other points in §24, I considered them in some depth in the case of *Eric Scowcroft v HMRC* [2018] UKFTT 295 TC ("*Scowcroft*") at [39] to [126]. What I said in that case in relation to the evidence provided by HMRC applies to this case, *mutatis mutandis*. I therefore accept that the assessments to penalties of £100 and £300 were validly made and notice properly given.

29. As to the vanishing paragraph 4 penalties see below at §§33 to 50.

Did the appellant have a reasonable excuse?

30. 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). In this case I find that it is for the reasons I have given in *Scowcroft* (at [120] to [135]).

31. The appellant was also entitled to rely on a third party unless the appellant did not take reasonable care to avoid the failure. He relied on his solicitor, something which was wholly reasonable in the circumstances, and as soon as he realised that the reliance was misplaced he delivered his return, so that that reliance is also a reasonable excuse.

Special circumstances

32. I do not need to address this issue.

The vanishing paragraph 4 penalties

33. Penalties of £900 were assessed on the appellant (see §6). In the review letter of 17 July 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 [that] 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 and £300 the raising of which HMRC does not have power to exercise discretion (*sic*), remain due and payable …"

34. I have no quarrel with anything in these passages that is not italicised. It is clear from this and other cases I have seen that representations were made to HMRC that the requirement in paragraph 4(1)(b) Schedule 55 FA 2009 for HMRC to exercise discretion over whether to issue daily penalties could not be met by the decision of the committee of officers of Revenue and Customs that was accepted as having exercised it in relation to penalties for late delivery of income tax returns (see *Morgan and another v HMRC* [2013] UKFTT 317 (TC) at [40], a point accepted as correct on appeal in *Donaldson v HMRC* [2016] EWCA Civ 646 (Mr Donaldson was the "another" with Mr Morgan))[2].

35. But the problem I have is with the purported withdrawal and cancellation of the daily penalties. Under the authority of what statutory power can this be done? Paragraph 18(3)(a) Schedule 55 FA 2009 provides that an assessment of a penalty under any paragraph of that Schedule is to be treated for procedural purposes in the same way as an assessment to tax, unless there is express provision in Schedule 55.

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[2] I hope the same has been done in relation to ATED daily penalties in items 11A and 11B in the table in paragraph 1 Schedule 55 FA 2009 which were inserted by paragraph 7 Schedule 34 FA 2013 with effect from 17 July 2013, long after the committee decision.

36. By "tax" here Parliament must mean "the tax concerned", the term used in paragraph 21(1) in relation to appeal procedures. In relation to these penalties that means CGT. An assessment to CGT is made under the provisions of TMA, and in these s 30A is headed "assessing procedure". Subsection (4) provides:

> "After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts."

There is nothing express in Schedule 55 on this topic.

37. It was however addressed in *Baylis (HM Inspector of Taxes) v Gregory* 62 TC 1 by the Court of Appeal. Slade LJ (with whom Parker and Mustill LJJ agreed) said:

> "The recent decision of this court in *Honig v Sarsfield* [1986] STC 246 has established that, for the purpose of applying the time limit imposed by s 40(1) of the Taxes Management Act 1970, as amended, ('the 1970 Act'), an assessment is made at the time when the inspector, authorised to make such an assessment, signs the certificate in the assessment book, not when notice of the assessment is served on the taxpayer.
>
> By what he has suggested is parity of reasoning, Mr. Flesch Q.C., on behalf of the trustees, has submitted that an inspector can effectively vacate or nullify an assessment merely by making an appropriate entry in his records, unilaterally and without any notice to the taxpayers. When Mr. Rothwell marked in his records the words 'vacated' and 'raised in error', this, it was submitted, ipso facto nullified the assessment made against the trustees.
>
> Though for the purpose of the relevant time limits an assessment can be made in the privacy of the inspector's office, it will have little, if any, other effect until notice of it is served on the person assessed. Until such service, such person is under no liability to pay; nor does the right of appeal conferred by s 31 arise. However, once notice of the assessment has been served, the position entirely alters. The taxpayer can get rid of the assessment by means of a successful appeal under s 31. Section 50 provides for the reduction or increase of an assessment in the case of an appeal. Section 54 provides for the settling of appeals by agreement. Section 32(1) contains express provisions for the vacation of an assessment in specified circumstances. It reads:
>
> > 'If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly.'
> >
> > However, and this, in my judgment, is the crucial point - the 1970 Act confers no general powers on an inspector to vacate an assessment. Significantly, s 29(6) specifically provides: 'After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.'

> In the present case, therefore, s 29(6) would, in my opinion, have clearly precluded Mr. Rothwell from altering the relevant assessment so as to reduce the sum assessed to a nominal sum. It is perhaps more debatable whether s 29(6) on its true construction would itself have prohibited him from withdrawing or vacating an assessment. Nevertheless, Mr. Sher was, in my judgment, right in submitting that (a) the vacation of an assessment has to be effected properly if it is to be valid, and (b) in the absence of any statutory authority for the purported 'vacation' by Mr. Rothwell, his entry in the assessment book which purported to record a vacation was not properly made and had no legal effect."

38. From this it is possible to say that there are three ways in which an assessment may be "vacated", "withdrawn" or "cancelled": by a Tribunal determining so; by an agreement under s 54 TMA or by a vacation under s 32 TMA. Perhaps it is better to say that there *were* three ways at the time *Baylis v Gregory* was decided (1987): time and tax administration have moved on.

39. But the only significant change has been in the introduction of a statutory review procedure by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) inserting sections 49A to 49I into TMA.

40. By virtue of s 49E(5) TMA a review may conclude that HMRC's "view of the matter in question" is to be, among other things, cancelled. The "matter in question" is the matter to which an appeal relates – s 49I(1)(a) TMA. Accordingly a reviewing officer may appropriately conclude, having carried out a review, that HMRC's view of the matter (to the effect that an appellant is liable to a daily penalty) is not sustainable and the penalty should be cancelled. That view having been arrived at, the reviewing officer must notify their conclusions within a period of 45 days beginning with the day when HMRC notified the appellant of HMRC's view of the matter in question, and unless the appellant notifies their appeal to the tribunal under s 49G TMA, the conclusion is treated as if it were an agreement in writing under s 54 TMA (and so conclusive and something done in accordance with the express provisions of the Taxes Acts, to quote from s 30A(4) TMA).

41. Only if this is what actually happened in this case can the cancellation of the daily penalty be within the express provisions of the Taxes Acts. What did happen is that the letter of NRCGT Team of 27 May 2017 in response to the appellant's appeal given to HMRC gave HMRC's view of the matter in question. But no such view was given after the appellant requested a review. Section 49B(2) states that if an appellant requires HMRC to review the matter in question, HMRC must notify the appellant of HMRC's view of that matter. The relevant period is the period of 30 days beginning with the day on which HMRC receive the notification from the appellant that the appellant requires a review ("notification date"), or such longer period as is reasonable.

42. The longer period plainly cannot start at a date earlier than the notification date. In this case no view of the matter was given in the relevant period. For what it is worth it is HMRC's view that a view of the matter in question must be given after the notification date (Appeals, Reviews and Tribunals Guidance ARTG 2213 and 2216).

43. The conclusions of the review to cancel HMRC's view of a matter in question can only in my view refer to such a view as is within s 49B(2). No other "view of the matter" exists for the purposes of sections 49A to 49I TMA. Furthermore the conclusions of a statutory review must be given within a period of 45 days (or longer) starting with the day that HMRC notified the appellant of HMRC's view. Again this must be the s 49B(2) view.

44. However by s 49E(8) where HMRC are required to undertake a review, as they were in this case, but they do not give their conclusions within the time period specified the review is treated as upholding HMRC's s 49B(2) view. In this case the conclusions were not given within that period. The subsection clearly envisages the effect of conclusions given *after* the period, but it seems to me it is equally apt to apply to conclusions given before the period starts (which it never will in a case like this). But there is no HMRC view of the matter within s 49B(2) to be deemed upheld, and s 49F(8) expressly refers to s 49B(2).

45. The effect of these provisions in this case is that there is then no time limit for notifying the Tribunal of an appeal (not an issue in this case), but also that the appeals against the penalty assessments have not to any extent been settled.

46. I did harbour a suspicion that HMRC may, had they been required to justify this action of theirs, have said that either they were using their powers of collection and management given to them by the Commissioners for Revenue and Customs Act 2005 or they were using their power in paragraph 16 Schedule 55 FA 2009 to make a special reduction.

47. The first-mentioned exercise of power would not be justiciable in this tribunal. But had it been exercised in this case I would have expected HMRC to say so, whether in the review letter or in the SoC. Had the power in paragraph 16 Schedule 55 been exercised again I would have expected HMRC to say so, especially as it can hardly be said that the circumstances were unusual or out of the ordinary, which HMRC say is the test they employ when considering whether to give a special reduction.

48. A similar exercise, drastically reducing penalties, was carried out by HMRC when the penalty regime for late returns under the Constriction Industry Scheme was changed in 2011. In *Anthony Bosher v HMRC* [2013] UKUT 579 (TCC) the Upper Tribunal noted (at [13]) that HMRC had used the power of mitigation in s 102 TMA to reduce the penalties under the previous regime to be equal to those that would have been imposed under Schedule 55 FA 2009 had it been in force at the relevant time. Section 102 TMA however was a general power of mitigation and did not require special circumstances.

49. The notification of the appeal says that HMRC have "removed the daily penalties of £900. Balance under contention £400". But because of the inability of HMRC to cancel the daily penalty in this case, I am treating the notification of the appeals as including the daily penalty. This is not to cast doubt on HMRC's intentions not to enforce the daily penalty, but it seems to me better that the matter should be put beyond any doubt.

50. I am therefore by this decision cancelling the daily penalties as well as the other penalties totalling £400.

Decision

51. Under paragraph 22(1) Schedule 55 FA 2009 I cancel the penalties of £100, £900 and £300.

52. 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: 21 June 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.