FIELD COURT TAX CHAMBERS

Non-residents CGT returns [1]

Some clarification would seem to be necessary regarding the obligations for submitting non-residents CGT returns and the penalties for failing to do so

In the case of *P Saunders v HMRC* [2017] UKFTT 765 (TC) (and in *R McGreevy v HMRC* [2017] UKFTT 690 (TC)), HMRC spectacularly failed to impose penalties for the late submission of non-resident CGT returns.

Miss Saunders sold a UK residential property at a loss. She was not resident in the UK and although she was aware that CGT can now be charged on non-residents who sell UK residential property at a profit, she did not know that it was necessary to submit a CGT return within 30 days of completion of the sale, even if she made a loss – failing which there would be a penalty. Bad luck.

Well, actually not bad luck; she should have known, and there was no excuse for not knowing, and please find enclosed a penalty of £1,300 which you might regard as a sort of aide-memoire. HMRC is all heart. I think it is called customer service.

However, the tribunal took the view that Miss Saunders had no obligation to submit a non-resident CGT return at all. The reasoning was that you have to make a return if you are the 'taxable person'; that is, the person who would be chargeable to CGT in respect of the gain. In this case, the appellant made a loss and was not therefore a 'taxable person' because there was no gain.

The tribunal went on to consider whether or not Miss Saunders would have had a reasonable excuse to relieve her from the penalty, even if she did have an obligation to file a non-resident CGT return.

HMRC argued that she had no excuse on the following grounds:

- non-resident individuals have an obligation to stay up to date with legislation in the UK;

- ignorance of the law is no excuse and she should have been aware of the changes effected by TMA 1970 s 12ZB; and

- the obligation to file a non-resident CGT return within 30 days of completion of the sale is not obscure or complex law.

Er, no, No and NO. The tribunal rejected all these arguments for reasons similar to those expressed in *R McGreevy* – not least the view of Judge Thomas that HMRC's suggestion was

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'claptrap' (a technical term derived from classical texts) and that the idea that the new legislation was not obscure or complex was 'preposterous'.

The tribunal even pointed to the fact that in its published materials on this subject, HMRC explained the requirements incorrectly – which rather supports the proposition that the law must be obscure or complex if HMRC did not get it right itself.

An appeal would seem to be likely, but in the meantime, there has been a further decision from the FTT – *Hesketh v HMRC* [2017] UKFTT 871 (TC) – where the tribunal upheld a penalty for the non-submission of the non-resident CGT return, taking the view that the cases of *R McGreevy* and *P Saunders* were wrongly decided. This might be said to be further evidence that the law is obscure or complex if even tribunal judges get it wrong.

It is difficult to know how the taxpayer (or non-taxpayer) is supposed to fulfil their tax obligations when faced with these conflicting decisions. The imposition of penalties in the light of such uncertainties do nothing to enhance the public perception of the fairness of the tax system or of those who are responsible for its operation. Some clarification or a sensible practice statement would clearly be welcome.

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