FIELD COURT TAX CHAMBERS

Non-residents CGT returns [1]

Is it possible that this unhappy episode could be coming to a conclusion?

It will be remembered that non-residents must file a non-residents capital gains tax (NRCGT) return within 30 days of completion of the sale of a UK residential property, even where there is a loss, and penalties have routinely been imposed by HMRC for failure to do so. This has given rise to a degree of dissatisfaction – and appeals to the tribunal.

Some tribunal judges have taken a firm view that being unaware of the requirement to submit a NRCGT return within the 30 day period can (in appropriate circumstances) represent a reasonable excuse.

HMRC has argued that there can be no reasonable excuse because:

a) non-residents have a duty to stay up to date with UK legislation;

b) ignorance of the law is no excuse; and

c) the obligation to file the NRCGT return is neither obscure nor complex.

One judge rejected these arguments as 'claptrap' and 'preposterous' – even pointing to the fact that HMRC explained the requirements incorrectly in their published materials, which rather supported the suggestion that the law must be obscure or complex if HMRC did not get it right.

On the other hand, another group of tribunal judges have taken the opposing view that ignorance of the law is no excuse and that failure to adhere to these statutory obligations inevitably gives rise to a penalty.

To have such judicial inconsistency cannot be good. (It resonates a bit with the length of the chancellor's foot – and that was not good either.)

The latest case of *Kirsopp v HMRC* [2019] UKFTT 217 might be thought to be just another in the increasing catalogue of conflicting decisions, creating yet further discontent… but perhaps not. This case might just bring the debate to a close.

The distinguished Upper Tribunal judge Charles Hellier (sitting in the FTT for this case) brought his authority to bear on this subject. He explained that there was a divergence of opinion among FTT Judges on the matter. He drew attention to the decision of the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156, which held that it was a matter for the judgment of the FTT in each case whether it was objectively reasonable for the particular taxpayer to have been ignorant of the requirements in question.

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Judge Hellier specifically rejected HMRC's argument that a taxpayer has an obligation to keep up to date with the law. He held that there is no such obligation. A penalty may arise from an inexcusable breach of the law, but not from the failure to keep up to date

In the circumstances of Mr and Mrs Kirsopp, Judge Hellier concluded that they had displayed a reasonable regard to complying with their tax obligations and remedied their failure within a reasonable time after they discovered the true position. They therefore had a reasonable excuse.

I would respectfully suggest that this must be right. It surely cannot be reasonable for HMRC to suggest that non-resident individuals have a duty to keep up to date with all aspects of UK tax legislation which could possibly affect them – and must regularly read all HMRC publications and be completely familiar with its website. It would follow from this reasoning that everybody in the world must have this duty. And why should this obligation not extend to all UK legislation – not just tax.

Can you imagine what the chairman of HMRC might say if he went to Sweden and was immediately fined a large sum of money by the authorities there. Why have I been fined? Because you have contravened one of our rules. You have a duty to be up to date with Swedish law (and with all the materials published by the government – all in Swedish), so pay up. But that is just silly, he would say. Well, yes.

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