

**Tax Chamber**  
**First-tier Tribunal for Scotland**

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[2017] FTSTC 2

Ref: TT/APL/SLFT/2017/0004

**DECISION NOTICE**

IN THE CASE OF

**STRAID FARMS LIMITED**

Appellant

- and -

**REVENUE SCOTLAND**

Respondent

**TRIBUNAL: Anne Scott, Legal Member**  
**Charlotte Barbour, Ordinary Member**

The Tribunal determined the appeal without a hearing under the provisions of Rule 27 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (default paper cases) having first read the Notice of Appeal, and attachments, dated 16 February 2017, Revenue Scotland's Statement of Case, with attachments dated 4 April 2017 and the Appellant's response thereto dated 3 May 2017.

## Introduction

1. This is an appeal against a penalty notice dated 1 February 2017, issued by Revenue Scotland to the appellant under Sections 168 and 170 of the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”). That penalty notice was issued because the appellant had not paid Scottish Landfill Tax on the due date for payment.
2. There is no dispute between the parties in regard to:
- (a) The factual background to the case;
  - (b) The relevant legislative provisions; and
  - (c) The fact that the penalty has been correctly calculated at the rate of 1% of the tax that was due and payable.
- We therefore summarise only the directly relevant facts and legislative provisions.

## Factual background

3. The appellant is a registered landfill site operator. It is a very small family run business and the sole director is 76 years old. A Mrs Harvey, who is not an accountant, has been submitting tax returns for the appellant for as long as it has been in operation. She works in the business for one day each week. Occasionally the director’s daughter also assists in the business.
4. The appellant was required to file a tax return for the accounting period April-June 2016 by no later than 13 August 2016. That was also the due date for payment of the tax. Where payment is made using BACS then there is an extension of five working days. The appellant always uses BACS. There were arrangements put in place for payment of the Scottish Landfill Tax on 29 July 2016, which was well ahead of those dates.
5. To celebrate her ruby wedding anniversary, Mrs Harvey had a long planned holiday for the summer of 2016. She was the only person in the appellant’s business who had any knowledge of the mechanics of filing returns and making payments to Revenue Scotland. Therefore, before her departure, in order to minimise the potential for any problems, she submitted an electronic tax return on 5 July 2016. In fact by doing so she inadvertently accelerated the due date for payment of the tax.
6. On 14 December 2016, Revenue Scotland emailed the appellant indicating that the tax had been paid after the due date for payment and a penalty would be issued unless a reasonable excuse could be established for that late payment. Links to guidance “RSTP3022-Reasonable excuse” and “RSTP3010-Penalties for failing to pay SLfT on time” were provided.
7. On 22 December 2016, Revenue Scotland wrote to the appellant asking for an explanation for the late payment but citing the wrong tax period and filing date. It was patently inaccurate because the due date for payment could not possibly be before the end of the relevant period. The appellant sought legal advice.

8. Correspondence with the appellant's lawyer then ensued in relation to the circumstances giving rise to the appellant's argument that there was a reasonable excuse for the late payment. The filing date error was not remedied but it was made explicit that the period was April to June 2016.

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9. On 1 February 2017, Revenue Scotland wrote to the appellant formally notifying the penalty, intimating review and appeal rights and stating:

10 "If you can satisfy us (or the First-tier Tax Tribunal for Scotland) that there is a reasonable excuse (Section 178 RSTPA 2014) for your failure to pay tax then this penalty may be withdrawn.

Revenue Scotland may reduce a penalty where a (sic) special circumstances apply (Section 177 RSTPA 2014)."

15 10. The letter of the same date to the lawyer made no mention of special circumstances.

11. The Penalty Assessment stated that the penalty amounted to £7,596. In addition an Interest Notice on unpaid tax amounting to £1,498 was also issued. The interest purported to have been levied under Section 217 of RSTPA. The Interest Notice stated  
20 that interest was payable from 6 July 2016.

12. When preparing the Statement of Case, Revenue Scotland noted that the Interest Notice had been incorrectly raised. On 4 April 2017, Revenue Scotland issued a letter withdrawing it.  
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13. Interest is exigible only from the "relevant date" in terms of Section 217 RSTPA and the relevant date is the filing date which in this case was 13 August 2016. The appellant had paid the tax on 29 July 2016 which is, of course, before the filing date.

30 14. The appellant did not seek a review of the decision since the correspondence had amounted to an informal review. The appellant appealed to the Tribunal on 16 February 2017.

## 35 **Legislation**

15. We annex at Appendix 1, Regulation 11 of the Scottish Landfill Tax (Administration) Regulations 2015. However, we highlight subsection (1) which reads:

40 "Where a return is to be made ... the tax ... payable must be paid to Revenue Scotland at the same time as the return is made".

16. Section 178 RSTPA provides that liability to a penalty will not arise if there is a reasonable excuse for the failure to make a payment timeously. There is no definition of reasonable excuse but Section 178(3) specifies that where a taxpayer relies on a third  
45 party to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. The full text is set out at Appendix 2.

17. Section 177 RSTPA specifies that "Revenue Scotland may reduce the penalty ... if it thinks it right to do so because of special circumstances". The full text of Section 177 is set out at  
50 Appendix 2. It can be seen that there is no definition of special circumstances and the examples of what do not constitute special circumstances are not relevant in this appeal.

18. Section 177(3) specifies that reducing a penalty includes:

- 5           “(a) remitting a penalty entirely,  
          (b) suspending a penalty, and  
          (c) agreeing a compromise in relation to proceedings for a penalty.”

### **The appellant’s submissions**

10   19. The appellant argues that the cumulative set of circumstances surrounding the appellant’s failure to pay:

          (a) Constitute “special circumstances” as

- 15           (i) They are “uncommon and exceptional”, and  
          (ii) Enforcement of the penalty would produce a result which is contrary to the compliance intention of RSTPA;

20           (b) Establish that the appellant has a “reasonable excuse for failure to pay the tax timeously”.

20. Those cumulative set of circumstances are stated to be:-

- 25           (a) The unusual and unexpected circumstances of an employee’s leave;  
          (b) The lack of understanding as to the obligation to pay the tax at the same time as the return is made;  
          (c) That payment was not deliberately withheld or delayed;  
          (d) That Revenue Scotland’s online portal for submitting tax returns is particularly complex;  
30           (e) That inaccuracies on Revenue Scotland’s part resulted in confusion, stress and cost for the appellant (presumably the director and/or Mrs Harvey in relation to confusion and stress); and  
          (f) Revenue Scotland delayed in issuing the penalty.

35   21. Revenue Scotland’s guidance is confusing in that it says:

40           “... the latest payment date will be the earlier of: the fifth working day after the submission date [or] the last working day which is, or precedes, the 44<sup>th</sup> calendar day after the end of the quarter to which the return relates”.

45   22. The Policy Memorandum relating to RSTPA makes it clear that the purpose of penalties is “... to promote compliance and deter non-compliance” and Revenue Scotland will be permitted to use its discretion to reduce or waive some penalties in certain circumstances and was expected to issue guidance.

50   23. The guidance in regard to special circumstances explains what is not a special circumstance and, in effect, extends to one sentence which is used at paragraph 47 of Revenue Scotland’s Statement of Case. That is set out at paragraph 26 below. It gives only one example which is stated as being illustrative of where such circumstances *might* exist. In the face of such minimalist guidance the indication in the Policy Memorandum that:

- (a) "The Respondent '... felt strongly that the two most important factors in exercising discretion ought to be: intent and the taxpayer's history of compliance'", and
- (b) "... the overall consensus was that ... the flat rate penalty should be applied with care and that the use should be proportionate".

should be considered to be relevant objectives in the application of the discretionary powers under Section 177.

## 10 Revenue Scotland's submissions

24. By contrast, Revenue Scotland argue that there is neither a reasonable excuse nor special circumstances applicable to the appellant's case which would warrant the waiving or reduction of the penalties. Even if the early submission of the return was a genuine mistake made in good faith it is neither a reasonable excuse and nor can it be described as a special circumstance. It is irrelevant that payment was not deliberately withheld or delayed. The appellant could have sought advice from Revenue Scotland.

25. It is argued that reasonable excuse is constituted where something unexpected or outside of the taxpayer's control happens that could not have been foreseen and which prevented the taxpayer from meeting a tax obligation. Reliance on a third party cannot be a reasonable excuse and nor can ignorance of the law.

26. As far as special circumstances are concerned, Revenue Scotland take the view that those are circumstances which are uncommon or exceptional or where the strict application of the legislation applying to the penalty in question produces a result that is contrary to the clear compliance intention of RSTPA.

27. The errors made by Revenue Scotland latterly have no bearing on the late payment of tax.

28. The penalty is for late payment of tax not in relation to filing a return so the online portal is irrelevant.

29. If the penalty is not upheld it would send a message that paying tax on time in a case such as that of the appellant is effectively "optional".

## Discussion

30. As can be seen, the core issues addressed by the parties are the concepts of reasonable excuse and special reduction for special circumstances, and neither phrase is defined in the legislation but both are widely used in UK legislation. We say that because the Explanatory Notes to RSTPA state:

"The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

31. There is therefore a considerable body of law in this field not least because the regime in respect of penalties relating to the devolved taxes replicates extensively the

penalty regime in respect of most UK taxes in Schedule 55 Finance Act 2009. We have been referred to no such authorities.

5 32. Although the penalty regimes have many common features and the language of the statutory provisions is very similar they are not identical. More importantly, the powers of this Tribunal in relation to consideration of penalties on appeal are significantly different to, and wider than, those of the UK First-tier Tribunal (“FTT”) so the jurisprudence must be considered in that context.

10 33. The jurisdiction of this Tribunal, as also the FTT, is derived wholly from statute.

15 34. The Tribunal has no inherent or general “supervisory” jurisdiction to consider taxpayer’s claims based on public law concepts such as fairness or inappropriate conduct by Revenue Scotland. The Upper Tribunal in *HMRC v Abdul Noor*<sup>1</sup> makes it clear at paragraph 31 that the absence of a supervisory jurisdiction does not preclude public law rights being considered, and given effect to, but whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction.

20 35. From 24 April 2017 the First-tier Tribunal for Scotland Tax Chamber took on the functions of the former Tax Tribunals for Scotland. Section 21 RSTPA states that the Tribunal “...is to exercise the functions conferred upon it by or under this Act”.

25 36. In the case of an appeal of an appealable decision, Section 244(2) RSTPA provides that:

30 “The tribunal is to determine the matter in question and may conclude that Revenue Scotland’s view of the matter in question is to be-  
(a) upheld  
(b) varied, or  
(c) cancelled.”

That is a wide jurisdiction.

35 37. Not all decisions are appealable and those that are, are defined in Section 233. All decisions made in terms of Part 8 of RSTPA are appealable. Accordingly, the decision to impose the penalty, which incorporates the decisions that there is no reasonable excuse for the late payment and that there is no special reduction for special circumstances is within our jurisdiction.

40 38. The fact that Revenue Scotland inappropriately issued an Interest Notice and took two months to repay the interest or that there were other inaccuracies in the correspondence are not matters that are within our jurisdiction and nor are the costs etc caused to the appellant by imposition of the penalty and interest.

45 39. The return was successfully filed online, as have all the other returns for the appellant, so the ease or difficulty of access online is not a relevant consideration.

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<sup>1</sup> 2013 UKUT 071 (TCC)

40. There was no delay in assessing the penalty. In this case the expiry of the time limit, in terms of section 180 RSTPA, is July 2018 and the assessment was issued in February 2017.

5 41. We have weighed in the balance all of the circumstances in this case but we stress that those circumstances are limited to those obtaining prior to, and at, the time that the return was lodged and the payment made.

*Reasonable excuse*

10 42. The Scottish Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a penalty if the taxpayer has an excuse, but the excuse must be a reasonable one.

15 43. As we indicate above reasonable excuse is not defined in RSTPA. In interpreting a statutory provision, it is necessary to have regard to the purpose of the particular provision and, insofar as possible, interpret its language in a way which gives effect to that purpose. The recent case of *UBS AG v HMRC*<sup>2</sup> makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically.

20 44. The concept of reasonable excuse is not confined to RSTPA and is to be found in the general tax law in the United Kingdom and in many other statutory contexts, particularly in the criminal law.

25 45. Lord Rodger of Earlsferry at paragraph 81 in *R v G*<sup>3</sup> says:

30 “... So the courts have recognised that any decision on whether an accused had a reasonable excuse must depend on the particular circumstances of case ... whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case”.

46. The test articulated by Judge Medd in *The Clean Car Company Limited v CEE*<sup>4</sup> has recently been approved in the context of Social Security legislation by Judge Rowland in *VT v SSWP*<sup>5</sup>. Judge Medd said:-

35 “...the test of whether there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do... the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer ... such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously ... many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse”.

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<sup>2</sup> 2016 UKSC 13

<sup>3</sup> 2009 UK HL 13

<sup>4</sup> 1991 VTTR 234

<sup>5</sup> 2016 UKUT 178 (AAC)

47. Accordingly it is incumbent on the Tribunal to look at the appellant's individual circumstances and at the underlying cause. The relevant individual circumstances are that there was total reliance on Mrs Harvey and uniquely she was to be on an extended holiday, presumably, at the filing date.

5 48. We say "presumably" because that is the clear statement in the Notice of Appeal but we have noted Revenue Scotland's record of a telephone call on 15 December 2016 which suggests that the return was submitted on 6 July 2016 (it was in fact the day before) and the tax paid on her return from holiday on 29 July. That makes no sense in the context of a filing date in August.

10 49. Clearly Mrs Harvey did not know that the tax had to be paid at the same time as the return was filed. Revenue Scotland have cited paragraph 54 of *Anderson v Revenue Scotland*<sup>6</sup> ("Anderson") as authority for the proposition that ignorance of the law can be no excuse. We agree and that is conceded by the appellant.

15 50. Whilst we accept that the appellant is correct in quoting from the guidance (see paragraph 21 above), that unnumbered guidance, headed "How to pay SLfT", makes it explicit that the rules for the date for payment vary. It goes on to state:

"After you select 'Submit' and choose a payment method, the latest payment date will be displayed on the return."

20 It is only after that that the quotation cited by the appellant is included in the guidance to explain how the payment date is arrived at.

51. Unfortunately, when filing the return, Mrs Harvey does not appear to have noted the entry on the return against "Latest payment date for arrangements satisfactory" which reads "12/07/2016". Since the payment was by BACS, although payment is due when the return is submitted, there is an extension of time allowed, so the latest date for timeous payment was 12 July 2016.

52. Furthermore, there is further guidance available and paragraph 1 of SLfT5004 reads:

30 "You must pay any tax payable as the result of an SLfT return at the same time as you make the return to us." and

paragraph 2 of SLfT5002 reads:

35 "You must pay any tax due at the same time as you make the return."

53. We do not accept the argument advanced for the appellant that the guidance is confusing.

40 54. Undoubtedly, in this case, Mrs Harvey was well meaning and the late payment arose because of a mistake or misunderstanding. Obviously it had not been understood that by submitting the return early, the tax would also be due early. In that context we note that the question as to whether a genuine mistake can amount to a reasonable

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<sup>6</sup> 2016 TTFT 1

excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*<sup>7</sup> where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

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

10        55. We accept that Mrs Harvey had an honest and genuine belief that she was paying the tax early but the confusion about the due date for payment, firstly in the context of a return which points out the “latest date for payment”, and secondly where the guidance notes are very clear, really cannot amount to a reasonable excuse.

15        56. Lastly, for the avoidance of doubt, section 178(3)(b) RSTPA stipulates that reliance on a third party cannot be a reasonable excuse unless the appellant took reasonable care to avoid the failure. Undoubtedly, the appellant did rely on Mrs Harvey but there is no suggestion that any action was taken by the appellant to ensure that the tax was paid on time.

57. The onus is on the appellant to establish that there was a reasonable excuse for the late payment. Whilst we understand why there was late payment no reasonable excuse has been established for that failure.

#### *Special circumstances*

20        58. Having found that there is no reasonable excuse, and that therefore the decision that the penalty is payable is affirmed, as Judge Berner indicated in *Collis v Revenue & Customs Comms*<sup>8</sup> (“Collis”), the Tribunal “...should normally go on to consider the amount of that penalty, including any decision regarding the existence or effect of any special circumstance ...”.

25        59. Like reasonable excuse, special circumstances is not defined in RSTPA but the concept is to be found in the general tax law in the United Kingdom and in other statutory contexts.

30        60. Section 177 RTSPA gives Revenue Scotland discretion to reduce the penalty because of special circumstances. The Tribunal has exactly the same discretion. That is not the case in UK tax law (eg paragraph 22 Schedule 55 Finance Act 2009) where the FTT, in the first instance, has to decide whether HMRC’s decision on special circumstances is “flawed” in a judicial review sense of that term.

61. The expression special circumstances was considered in relation to employment law in the well-known decision of the Court of Appeal in *Clarks of Hove Limited v Bakers Union*<sup>9</sup> where Jeffrey Lane LJ said at page 1216 in a much quoted passage:

35            “What, then is meant by ‘special circumstances’? Here we come to the crux of the case ...

In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word ‘special’ in the context of this Act”.

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<sup>7</sup> 2012 UKFTT 315 (TC)

<sup>8</sup> 2011 UKFTT 588 (TC)

<sup>9</sup> 1978 1 W.L.R. 1207

62. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*<sup>10</sup> said “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

5 63. The meaning of the expression special circumstances, in Schedule 24 Finance Act 2007, was examined by the UK Tribunal in *Collis* where the Tribunal said at paragraph 40:

10 “To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the schemes or provisions themselves”.

We agree.

15 64. In our view, special circumstances must mean something different from, and wider than, reasonable excuse for if its meaning were to be confined within that of reasonable excuse, Section 177 would be redundant. Furthermore because Section 177 envisages the suspension of a penalty, not only entire remittance, it must be capable of encompassing circumstances in which there is some culpability for the failure, i.e. where it is right that some part of the penalty should be borne by the taxpayer. Accordingly, in our view, special circumstances encompass a situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.

20 65. We agree with Revenue Scotland in their guidance RSTP3023 that because the legislation already provides a reduction for the quality of the taxpayer’s disclosure and for reasonable excuse that those will not amount to special circumstances. The logical consequence of that is, as was decided in *White v HMRC*<sup>11</sup> at paragraph 70, that “...special circumstances must relate to matters which cannot be taken into account in the reductions set out in the statute, and go to the events underlying the understatement...” or in this case late payment.

30 66. We note that Revenue Scotland have focussed on reasonable excuse and have not advanced any argument or rationale for their decision that there should be no special reduction in the penalty because of special circumstances beyond stating that none of the grounds advanced by the appellant produce a result that is contrary to the clear compliance intention of the penalty provisions.

67. That is a direct reference to Revenue Scotland’s guidance “RSTP3023–Reduction of a penalty for special circumstances” which reads:

“We may reduce penalties for special circumstances where imposing the penalties would be contrary to the clear compliance intention of the legislation applying to the penalty in question.”

35 68. What then is the compliance intention of this penalty regime? Of course, the objective of each and every penalty provision is to promote compliance and deter non-compliance. Indeed both parties recognise that.

40 69. The list of non-compliant behaviour is set out at paragraph 103 of the Policy Memorandum. The first such behaviour is “failure to provide a tax return, or to deliver any other document on or before the filing date”. “Filing date” is defined at Section 82 RSTPA which reads:

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<sup>10</sup> 1971 3 All ER 967

<sup>11</sup> 2012 UKFTT 364 (TC)

“In this Act ‘the filing date’ in relation to a tax return is the date by which that return requires to be made by or under any enactment”.

5 The filing date in this instance was 13 August 2016. It is for that reason that interest does not fall to be levied in respect of the late payment of tax because interest runs from the filing date. It is clear that the intention was to ensure timeous filing of returns by the known filing date.

70. Of course, the second non-compliant behaviour is “failure to make a tax payment on time” and that is the situation in this matter since the payment is technically late because, by submitting the return early, the due date for payment was accelerated.

10 71. We accept that by introducing the Regulations providing that payment of tax is due on the earlier of the filing date or the actual date of filing the return, the Scottish Parliament did intend to bring forward the due date for payment. We also understand that from an administrative point of view, it makes perfect sense to demand payment of the tax when a return is filed.

15 72. However, we find it very harsh that where a taxpayer pays tax before the filing date, so the public purse is enriched ahead of that date, the taxpayer is penalised not only by not having the use of that money but also by the imposition of a penalty if payment is not made at the same time as the return is filed. Was that the intention of the Scottish Parliament?

20 73. In our view there is a disconnect between the penalty regime and Regulation 11. RTSPA received Royal Assent on 24 September 2014, having been passed by the Scottish Parliament on 19 August 2014. Accordingly, the penalty regime was in place long before the Regulations were laid before the Scottish Parliament on 9 January 2015. The context and intention for the penalty regime is very clear from the terms of the Policy  
25 Memorandum to the RSTPA.

74. We were not referred to it but, paragraph 10 of the Policy Memorandum makes it explicit that the Policy Objective was that there would be “...three kinds of financial penalties for non-compliant behaviour – fixed penalties, daily penalties and percentage-based penalties where the penalty is linked to the potential loss in tax revenues”

30 75. In this case, we find that there was no potential loss in tax revenue. The whole object of the exercise was to pay the tax and to pay it earlier than was believed, albeit erroneously, to be necessary. That is abnormal in the context of late payment of tax.

76. Percentage-based penalties are explained at paragraph 104 of the Policy Memorandum and that reads:

35 “Percentage-based penalties (calculated by reference to the amount of the tax liability) for continued failure to comply with an information notice or continued obstruction of an officer carrying out an inspection. This is where the penalty is linked to the potential loss to Revenue Scotland by non-  
40 payment of tax, underassessment or inflated claim of refund by the taxpayer.”

77. Paragraph 105 goes on to explain that:

45 “The expectation is that the different types of penalties will form a hierarchy, with the mildest being the fixed penalties and the most serious being penalties based on a percentage of the tax calculated as being due”.

78. In this appeal we are therefore looking at the most serious type of penalty. Of course, continued non-payment of tax and or multiple failures to pay tax give rise to higher penalties rising to a maximum of 5% of the tax (Sections 171-173 RSTPA).

5 79. The appellant's stance on the Policy Memorandum is set out at paragraph 23(a) above. In fact the appellant's quotation is not accurate and it is misleading. It is derived from paragraph 112, which is one of three paragraphs in the Policy Memorandum under the heading "Consultation".

10 80. Paragraph 112 does not state that the Respondent (ie Revenue Scotland) felt strongly that intent and history of compliance are the two most important factors when exercising discretion. What it does say is to report that respondents to the Consultation exercise had "felt particularly strongly" that these were the most important factors.

81. We can see that the legislation has clearly taken account of the first of the three paragraphs under the heading "Consultation" and paragraph 111 reads:

15 "The list of non-compliant behaviour set out in the consultation paper appeared to be reasonable to the majority of those who provided a view, although some requested that greater distinction in terms of penalties should be made between tax evasion and legitimate tax planning and also between careless mistakes and deliberate mis-statements and concealment."

20 An example of the implementation of that is Section 167 RSTPA which distinguishes between deliberate withholding of information and other cases. That also covers the question of the taxpayer's intent as does Section 176 where Revenue Scotland can agree to a deferral of payment of tax. Clearly, that would not be granted in circumstances where Revenue Scotland believes that the taxpayer had malevolent intentions!

25 82. As far as paragraph 112 is concerned, Section 165 RSTPA makes provision for a hierarchy of penalties related to the taxpayers' compliance.

83. The appellant's quotation at paragraph 23(b) above is an accurate quotation of part of paragraph 113 of the Policy Memorandum under the heading "Consultation". That paragraph is the final paragraph and the full quotation is worthy of attention. It reads:

30 "On balance the overall consensus was that the proposed sanctions and their possible uses were reasonable but that the flat-rate penalties should be applied with care and that use should be proportionate."

84. Given that the previous two paragraphs have been reflected in the Act, and that is why the regime was believed to be "reasonable", then it would be logical to assume that the provisions of this paragraph should be honoured.

35 85. The compliance intention at the time that RSTPA was promulgated and then enacted was clearly to ensure that returns were filed on time and the tax was paid in time. The hierarchy of penalties meant that a late return attracted only a penalty of £100 in the first instance and it was irrelevant if there was no tax due. The greater of a tax geared penalty or £300 only came into play (Section 166) after the failure to file a return had continued for six months after the penalty date.

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86. Interest on overdue tax only runs from the filing date. It does not appear to have been envisaged at that juncture that there would be a situation where tax might be due before the filing date. Had that been envisaged then, no doubt, there would have been provision for interest to run from that date.

5 87. Clearly Revenue Scotland worked on that assumption in this case when raising the Interest Notice but, on checking the legislation, found that they were wrong.

88. Although there is a hierarchy of tax geared penalties for failure to pay the tax on time, logically if interest does not start to run until the filing date, it seems odd that there is no smaller penalty before that date. Perhaps the situation that we are dealing with in this appeal had simply not been foreseen. It seems incongruous to levy a penalty calculated by reference to the tax, and that is at the serious end of the scale of penalties, where a return is filed early but the tax not paid at the same time. That is extremely harsh.

89. That raises the question as to whether the penalty is proportionate.

15 90. In *Anderson* at paragraph 25, Revenue Scotland is reported as having argued that the penalty regime has a series of checks and balances whereby there is provision for mitigation of penalties in the light of individual circumstances and that that struck an appropriate balance between fairness to the individual and the interests of the community in running an efficient and effective tax regime. That argument was advanced in the context of proportionality.

#### *Proportionality*

91. This is an area where there is extensive jurisprudence.

92. The Upper Tribunal in *HMRC v Total Technology*<sup>12</sup> (“Total”) stated at paragraph 74:

25 “[74] We turn then to the question whether proportionality is to be assessed at a high level, that is to say whether it is correct to view the default surcharge regime as a whole, recognising the possibility of its producing, in some cases, a disproportionate and possibly entirely unfair result; or whether proportionality is to be assessed at an individual level by asking whether the penalty imposed on a particular taxpayer on the particular facts of its case is disproportionate.”

30 93. The Tribunal went on to say at paragraph 76, that:

35 “Even if the structure of the surcharge regime is a rational response to the late filing of returns and the late payment of VAT, it is, nonetheless necessary to consider the effect of the regime on the particular case in hand. It is necessary to do so not least because ...a penalty must not be disproportionate to the gravity of the infringement ...”.

94. We are not concerned here with the penalty scheme as a whole but rather confine ourselves to looking at the penalty at an individual level.

95. The starting point for that is Article 1 to the First Protocol (“A1P1”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms. That reads:

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<sup>12</sup> 2012 UKUT 418 (TCC)

“Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

5 The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

10 96. The appellant is a “legal person”. In *Anderson* it is reported at paragraph 19 that Revenue Scotland accepts that if A1P1 were to be engaged then that could be considered as a special circumstance in terms of section 177 RSTPA, albeit it was not in that case. At paragraph 20 it is reported that in considering proportionality, Revenue Scotland relied on the four stage criteria expounded by Lord Sumption at [20] in *Bank Mellat v HM Treasury*<sup>13</sup> (“Mellat”) and that reads:

15 “Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure in order to determine (i) whether its objective is sufficiently important to justify the limitation of a  
20 fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used, and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

25 In this case they do overlap and therefore we look at them in the round.

97. Because of the said overlap of these factors, we also refer to the dicta of Simon Brown LJ in the very well known case of *International Transport Roth GmbH v Secretary of State for the Home Department*<sup>14</sup> (“Roth”) where he sets out the test for assessing  
30 proportionality at paragraph 26 as follows:

“...it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?”

35 That is a high threshold which must be surmounted before a court or tribunal can find that a penalty that has been correctly levied in terms of relevant legislation is disproportionate. It is almost routinely cited by HMRC in UK tax penalty cases.

98. What would be so plainly unfair? The Court in *James and Others v United Kingdom*<sup>15</sup> (“James”) at para 50 said that the “fair balance” that was required would protect individuals  
40 from having to bear “an individual and excessive burden”.

99. We accept that the good administration of the tax system does rely on those who fall within it to comply with their legal obligations and that it is for that reason that there is a penalty regime.

100. We know and accept that the Scottish Parliament, like every other legislature  
45 considering A1P1 enjoys a wide margin of appreciation and *James* at paragraph 46

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<sup>13</sup>2013UKSC 39

<sup>14</sup>[2003] QB 728

<sup>15</sup>1986 8 EHRR 123

makes it explicit that that is the case unless that which is at issue is “manifestly without reasonable foundation” and therefore not in the public or general interest.

5 101. We accept that a penalty of 1% would be proportionate where tax has not been paid by the filing date (and that interest will also run from that date) and that is because there are checks and balances and Revenue Scotland, and we, have discretion. However, we have considerably more difficulty with this situation.

10 102. At first glance, on the face of it, a penalty of 1% is not necessarily disproportionate. However, the principal feature and objective of the penalty regime is that there is a hierarchy of penalties linked to the seriousness of the statutory failure on the part of the taxpayer.

15 103. What then is the “gravity of the infringement” in the words of *Total*? In our view, although the early filing of the return has had harsh consequences, the reality is that tax has been paid far earlier than would otherwise have been the case and the public purse has benefitted. If the appellant had paid the tax on 6 July 2016 but filed the return on 29 July 2016 there would have been no penalty. Of course that is not what happened but it puts what did happen in context in terms of gravity.

104. We do not find that this penalty has been applied with care as it is suggested that it should be by paragraph 113 of the Policy Memorandum.

20 105. Revenue Scotland simply say that if tax is not paid in accordance with the provisions of the Regulations then the penalty regime applies with full force and effect. They do not appear to have considered the detail of the compliance intention of the penalty provisions and in particular whether this particular penalty is proportionate in these individual circumstances.

25 106. As we indicate above, we find that there is a disconnect between the later Regulations and the legislative provisions for penalties and interest, which are consistent, and are both to be found in RSTPA. If harsh penalties can apply if errors are made when paying tax earlier than the filing date that cannot be in the interests of the community (*Mellat*) since it can only serve to encourage payment at the latest possible date.  
30 Rationally that does not make sense.

35 107. The interests of the community would have been served if the appellant had simply filed and paid at the filing date. We cannot see that there is a fair balance in penalising the appellant for paying tax much earlier than the statutory filing date. The amount of the penalty in that situation is an excessive burden. The penalty, in these circumstances, is both harsh and unfair.

108. Specifically and particularly, it does not reflect the clear compliance intention of the penalty regime to ensure compliance with the tax legislation by a hierarchy of penalties that are applied with care and which are proportionate.

40 109. The penalty scheme, viewed as a whole is rational and proportionate but this individual penalty is not proportionate judged against the policy objective of the legislation which is clearly set out in the Policy Memorandum. It is not reasonable.

## **Conclusion**

5 110. We do not accept Revenue Scotland's view of the matter. We uphold the appeal in part and vary the penalty to £100 which is the penalty imposed at the lowest end of the penalty regime. That accords with the objectives expressed in the Policy Memorandum and the Explanatory Notes for RSTPA.

10 111. 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 Section 34 RSTPA and Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016. The application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

15 **ANNE SCOTT**

**President**

**RELEASE DATE: 26 JULY 2017**

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## Regulation 11 of the Scottish Landfill Tax (Administration) Regulations 2015

**Payment of tax**

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**11.**—(1) Where a return is to be made under regulation 10, the tax or additional tax payable must be paid to Revenue Scotland at the same time as the return is made.

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(2) Tax payable as a result of the amendment of a return must be paid at the same time as the amendment is made.

(3) For the purposes of subsections (1) and (2), tax is treated as paid if arrangements satisfactory to Revenue Scotland are made for payment of the tax.

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(4) A return under regulation 10 must also include a declaration by the taxpayer that the return is, to the best of the taxpayer's knowledge, correct and complete.

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(5) However, where the taxpayer authorises an agent to complete the return, the agent must certify in the return that the taxpayer has declared that the information provided in the return is to the best of the taxpayer's knowledge, correct and complete.

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(6) Revenue Scotland shall not be obliged to reimburse any tax owed by it to an operator (as defined in section 12(2) of the Act) until any outstanding tax return has been made by the operator and tax in respect of the return has been paid to Revenue Scotland.

(7) See section 74 of the RSTP Act for the taxpayer's right to amend a return and sections 100 to 103 of that Act in respect of defences by Revenue Scotland of unjustified enrichment in respect of a claim by the taxpayer for reimbursement in respect of an overpayment of tax.

**177 Special reduction in penalty under Chapter 2**

- 5 (1) Revenue Scotland may reduce a penalty under this Chapter if it thinks it right to do so because of special circumstances.
- (2) In subsection (1) "special circumstances" does not include—
- 10 (a) ability to pay, or  
 (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.
- (3) In subsection (1) the reference to reducing a penalty includes a reference to—
- 15 (a) remitting a penalty entirely,  
 (b) suspending a penalty, and  
 (c) agreeing a compromise in relation to proceedings for a penalty.
- 20 (4) In this section references to a penalty include references to any interest in relation to the penalty.
- (5) The powers in this section also apply after a decision of a tribunal or a court in relation to the penalty.

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**178 Reasonable excuse for failure to make return or pay tax**

- (1) If P satisfies Revenue Scotland or ( on appeal) the tribunal that there is a reasonable excuse for a failure to make a return, liability to a penalty under sections 159 to 167 does not arise in relation to that failure.
- 30 (2) If P satisfies Revenue Scotland or (on appeal) the tribunal that there is a reasonable excuse for a failure to make a payment, liability to a penalty under sections 168 to 173 does not arise in relation to that failure.
- 35 (3) For the purposes of subsections (1) and (2)—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
- 40 (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.
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