



Reference number: TT/APL/LBTT/2017/0006

Reference number: FTS/TC/AP/17/1001

**THE FIRST-TIER TRIBUNAL FOR SCOTLAND
TAX CHAMBER**

REDWING PROPERTY LIMITED

Appellant

- and -

REVENUE SCOTLAND

Respondents

TRIBUNAL: Kenneth Campbell QC Legal Member

The Tribunal determined the appeal on 17 August 2017 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 Notices of Appeal, and attachments, dated 2 March 2017 (case LBTT/2017/0006) and 22 May 2017 (case FTS/TC/AP/17/1001), and Revenue Scotland's Statement of Case, with attachments, dated 13 April 2017, the appellant's response dated 17 May 2017, and further email observations by the parties dated 27 June and 4 July 2017.

DECISION

The appeals

1. This is the Tribunal's decision in two related appeals, both brought by Redwing Property Limited ("Redwing"). On 26 June 2017, the President of the Tribunal directed that the appeals run concurrently.

2. Redwing's appeals both relate to penalty notices issued by Revenue Scotland ("RS") under sections 159, 160 and 161 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA"). There are two penalty notices dated 20 December 2016, and two penalty notices dated 9 March 2017. The December 2016 penalty notices relate to 8 Thomson Street, Strathaven, Lanarkshire ("8 Thomson Street"). The March 2017 penalty notices relate to 10 Thomson Street, Strathaven, Lanarkshire ("10 Thomson Street").

3. The first of the December 2016 penalty notices was issued for failure to make a Land and Buildings Transaction Tax ("LBTT") return under section 29 of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") by the date for which the return was required. The amount of penalty under this notice, being a first penalty for failure to make a return under section 160(2), was £100. The second of the December 2016 penalty notices was issued in respect of continuing failure to make an LBTT return after three months from the penalty date. In terms of section 161(2) of RSTPA, the amount of penalty under this notice is £10 per day for up to 90 days, and was fixed at £780.

4. The first of the March 2017 penalty notices was issued for failure to make an LBTT return under section 29 of LBTTA by the date for which the return was required. The amount of penalty under this notice, being a first penalty for failure to make a return under section 160(2), was £100. The second penalty notice was issued in respect of continuing failure to make an LBTT return after three months from the penalty date. In terms of section 161(2) of RSTPA, the amount of penalty under this notice is £10 per day for up to 90 days, and was fixed at £780.

5. Redwing accept that the LBTT returns were made late in each case. They do not appeal against either of the £100 late filing penalties. The appeals therefore focus solely on the penalties under section 161(2) of RSTPA. The issues which arise in each appeal are identical, and both appeals are therefore dealt with in this single decision.

Factual background

6. Solicitors acting for Redwing were instructed in February 2016 to carry out conveyancing to effect the transfer of title to 8 Thomson Street and to 10 Thomson Street. The effective date for LBTT purposes for the 8 Thomson Street transfer was 26 February 2016. The filing date for the return was thus 27 March 2016. The return was received by RS on 13 September 2016. No LBTT was payable in respect of the transaction. The effective date for LBTT purposes of the 10 Thomson Street transfer

was 25 March 2016. The filing date for the return was thus 24 April 2016. The return was received by RS on 6 October 2016. No LBTT was payable in respect of this transaction either.

5 7. Returns having eventually been made, RS wrote to the solicitors acting for Redwing enquiring about the circumstances in which the returns were made late. RS wrote about 8 Thomson Street on 15 September 2016, and about 10 Thomson Street on 7 October 2016. The response was the same in each case, and was that the employee who dealt with the conveyancing transactions had failed to lodge the deeds with Registers of Scotland or to make the LBTT return. That state of affairs had
10 become apparent after she left the solicitors' employment earlier in 2016, as a result of a full file review being undertaken. The absence of registration and of the LBTT return had been noted as a result of that file review, and had been rectified by the solicitors once they were aware of the situation.

15 8. RS issued the penalty notices mentioned above. The solicitors acting for Redwing sought review of each of the penalty notices issued under section 161(2) RSTPA. In relation to 8 Thomson Street, the review request was dated 21 December 2016, and the following reasons were advanced:

20 "Our clients purchased a property which was below the LBTT threshold and so no tax was payable. The additional penalty is excessive given that no tax was due in the first place. The penalty expressed as a percentage of the purchase price is almost 1%. Our clients were not at fault here. Our then employee who was entrusted with our client's transaction including complying timeously with LBTT legislation did not fulfil her obligation either to our client or to our firm. Her departure from our employment has allowed us to review our
25 systems to make sure that LBTT returns are lodged timeously in future."

9. In relation to 10 Thomson Street, the review request was dated 18 March 2017, and the reasons for the request were substantially the same as those advanced about 8 Thomson Street. In addition, the solicitors referred to two other transactions in which they contended similar issues arose.

30 10. RS reviewed the penalty notices. By decision letter dated 2 February 2017, RS upheld the penalties relating to 8 Thomson Street. By decision letter dated 10 May 2017, RS upheld the penalties relating to 10 Thomson Street. Redwing appealed to the Tribunal on 2 March 2017 in relation to 8 Thomson Street, and on 22 May 2017 in relation to 10 Thomson Street. On 26 June 2017, the President of the
35 Tribunal directed that the appeals should run concurrently.

Legislation

11. The following provisions of LBTTA are relevant to this appeal: sections 1, 29, and 63. These are set out in Annex 1.

12. The following provisions of RSTPA are relevant to this appeal: sections 159-161, 177 and 178. These are set out in Annex 1.

Grounds of Appeal

5 13. Redwing's grounds of appeal are substantially the same in both cases. Given that they were prepared by solicitors, the grounds are surprisingly lacking in focus, being, in the main, a factual narrative. Section 242(3) of RSTPA provides that:

"The notice of appeal [to the Tribunal] must specify the grounds of appeal".

10 While it is true that the Tribunal's rules of procedure do not specify the form or content of grounds of appeal, it is perhaps instructive to consider Rule 6.2(2) of the Sheriff Appeal Court Rules, which specifies the contents of a Note of Appeal to that court. As to grounds of appeal, those Rules require an appellant to

15 "state the grounds of appeal in brief specific numbered paragraphs setting out concisely the grounds on which it is proposed that the appeal should be allowed."

Parties appealing to this Tribunal may find that a helpful approach to framing grounds of appeal.

20 14. The grounds of appeal contain a re-statement of the position advanced by the solicitors in the correspondence with RS seeking review of the penalties, which is set out in paragraph 7 above. In addition, the grounds of appeal contain references to two other transactions, details of which were provided to RS by Redwing's solicitors in a letter dated 18 January 2017, in which, it is said, LBTT returns were submitted late for the same reasons as in this case and in which RS determined that no penalty was due.

25 15. The grounds of appeal do not spell out whether Redwing contend that there was a reasonable excuse for the late submission, or that there exist special circumstances and that the penalty should therefore be remitted. However this is clarified in the submissions outlined below, from which it is evident that both are relied on. It also appears that a separate ground of appeal is advanced that RS erred
30 in not treating the review requests in these two cases in the same way as in the two earlier cases mentioned in the solicitors' letters of 18 January and 16 March 2017.

Parties' submissions

Submissions for Redwing

35 16. Redwing submits that the circumstances surrounding the late submission of the LBTT returns to RS amounts to a reasonable excuse because those circumstances were not foreseen by them, and were outwith their control. They further submit that

the circumstances should be held to amount to special circumstances, and that there was no deliberate intention of not submitting the return timeously.

17. The circumstances relied on by Redwing are those which were advanced in the review applications. Those are that the appellants, Redwing, relied on their solicitors to attend to the conveyancing and the LBTT filing. The solicitor dealing with these transactions resigned in April 2016. Although a new member of staff was recruited, a file review was not completed for five or six months. The solicitors assert that was a reasonable period of time to complete the review. 8 Thomson Street came to light in September 2016, and 10 Thomson Street a little later. Neither Disposition had been sent for registration, nor had the LBTT return been made in either case. They were attended to once they came to light.

18. Separately, Redwing argue that the penalty should be reduced, it appears, because the value of the properties was each below the LBTT threshold. That appears to be the only reason relied on for that submission.

19. In its requests to RS to review the penalties, Redwing had relied on two earlier cases of delay resulting from the same circumstances of the same solicitor's illness and resignation, and in which penalties had been cancelled. That reliance was renewed. Two arguments were advanced. First, that contrary to RS's argument that in the earlier cases the problem had come to light and been rectified within a couple of months, "it was not feasible for all files to be checked within a couple of months due to other work commitments with ongoing files." Redwing also note that, in relation to 10 Thomson Street, RS took around five months to issue a penalty notice. Secondly, there appears to be an argument that RS erred in law either by not treating like cases alike, or in some sense failing to take into account relevant circumstances.

Submissions for RS

20. RS submits that there is neither reasonable excuse, nor exceptional circumstances in either case. Reasonable excuse is constituted where something unexpected or outside of the taxpayer's control happens that could not have been foreseen, and which prevented them from meeting a tax obligation.

21. RS submits that special circumstances 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.

22. RS argues that the responsibility is that of the taxpayer, Redwing, and that it cannot escape that by reliance on a third party, namely its solicitors, unless it can show that it took reasonable care in doing so. There was no evidence, for example, that it had checked with the solicitors to ensure that the return had been made. There had to be more than mere reliance on employment of an agent.

23. So far as the transaction value was concerned, RS points out that the good administration of the tax system relies on those who fall within it complying with their obligations. The timeous submission of returns, even when there is no tax payable, is a requirement of the tax system relating to LBTT. The penalty regime is intended to promote compliance and to deter non-compliance. Imposition of the penalties in these two cases is rationally connected to objective of the tax system.

24. Although it says that it did not receive the letter dated 18 January 2017 from Redwing's solicitors sending details of the two earlier cases raising the same issues as the present cases, RS says that their existence was known to the officer who carried out the reviews of the penalty notices in both Redwing applications. The earlier cases had properly been distinguished because in those cases the returns were submitted in late May and early June 2016 (between one and two months after the employee resigned), whereas in the present cases, the returns had been submitted on 13 September and 6 October 2016 (between five and six months after the employee's resignation).

Discussion and reasons for decision

25. As will be evident, the central issues in these appeals are the concepts of reasonable excuse and reduction by reason of special circumstances. Neither phrase is defined in the legislation, but both are widely used in UK legislation. In that connection, it may be observed that 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.”

26. There is therefore a considerable body of law to draw on in this field not least because the regime in respect of penalties relating to all of the devolved taxes replicates extensively the penalty regime in respect of most UK taxes found in Schedule 55 to the Finance Act 2009.

27. There was no reference to that authority in the submissions for either party. However, the decision of this Tribunal in the case of *Straid Farms Ltd v Revenue Scotland* TT/SLFT/2017/0004, delivered after the parties' written submissions were received in these appeals, contains a detailed consideration of case-law about reasonable excuse and special circumstances. *Straid Farms* was a Scottish landfill tax appeal, however it is clear from that survey of the case-law that these concepts are widely found in a variety of statutory contexts, and in a number of tax contexts in particular. The provisions about reasonable excuse and special circumstances are the same for LBTT and landfill tax, and the same legal principles should therefore be followed in LBTT cases which were discussed in the landfill tax context in *Straid Farms*.

Reasonable excuse

28. What is the effect of following that approach? The onus of establishing the existence of a reasonable excuse lies on the appellant; and in considering such arguments, the Tribunal must look at an appellant's individual circumstances, and at the underlying cause of the appellant's act or failure to act.

29. 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. (The full text is set out in Annex 1.) Although a client might ordinarily expect to be able to rely on the competence and efficiency of his or her (or its) solicitor, standing the terms of section 178(3), that is not of itself sufficient to discharge the obligation to make an LBTT return. There is no definition of reasonable excuse, but Section 178(3) provides that where a taxpayer relies on a third party to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. There is no evidence that Redwing did so, whether by enquiry of its solicitors about the LBTT return, or otherwise.

30. Turning to the other circumstances relied on, the Tribunal is not satisfied that the lapse of between 5-6 months before the solicitors' discovery of the failure of their former, to record the Disposition or to file the LBTT return, amounts to a reasonable excuse in either case. Redwing's solicitors submit that "it was not feasible for all files to be checked within a couple of months due to other work commitments with ongoing files." There is no indication of the volume of files taken over, nor, given the fact that a new member of staff was recruited, why the file review took so long. All the more so, when two cases of failure to record Dispositions and to make LBTT returns had in fact come to light at an earlier stage. It might be thought that would provide a sufficient imperative to expedite the file review, if one were needed.

Special circumstances

31. As the Tribunal observed in *Straid Farms*,

"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 Commrs* ("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 ...'.

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."

32. Section 177 RSTPA provides a discretionary power to RS: "Revenue Scotland may reduce the penalty ... if it thinks it right to do so because of special

circumstances". (The full text is set out in Annex 1.) From that, it will be seen that there is no definition of special circumstances; further, the examples contained in section 177 of what do not constitute special circumstances are not relevant in these appeals.

5 33. The approach of the Tribunal in *Straid Farms*, at paragraph 64 in particular, is helpful in clarifying when circumstances are special:

10 "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
15 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 34. The fact that the value of each transaction is below the LBTT threshold is not a special circumstance. The Tribunal has previously rejected arguments about penalties being disproportionate in cases where no LBTT is due; see *Anderson v Revenue Scotland* [2016] TTFT 1, particularly paras 47-51; and *Watts v Revenue Scotland* [2017] FTSTC 1, at para 19. There is no distinction between the LBTT threshold argument in those cases, and the argument which is put in the present appeals. The analysis in those cases is equally applicable in the present appeals. The appellant's submission on this point must fail.

25 35. The circumstances relied on in these two appeals are unusual. However, they are not unique, even within the offices of Redwing's solicitors, where there were two similar cases several months previously. The fact that there had already been not one, but two similar events several months previously ought to have prompted swifter and more decisive action by the solicitors.

30 36. On the other hand, on the evidence produced, there is no indication of culpability on the part of Redwing, as opposed to their solicitors, on whom they appear to have relied. Nonetheless, the scheme of LBTTA places the compliance obligations on the taxpayer, whether or not an agent is involved. It follows that a degree of diligence is required by the taxpayer in discharging the compliance
35 obligations and taking reasonable steps to ensure that any agent is equally diligent. While the Tribunal was furnished with some evidence about the solicitors' failings, it was provided with no evidence about the extent of Redwing's engagement with the LBTT process. The Tribunal is, in effect, being invited to hold that the solicitors' organisational failings are special circumstances for the purposes of section 177

RSTPA. Standing the compliance obligation identified in paragraph 36, those organisational failings cannot justify the reduction of the penalties in their entirety.

37. However, the Tribunal is satisfied that there would be significant unfairness in requiring Redwing to meet the whole of the penalty. It is clear from cases in other areas of, UK, tax law, this is a fact-sensitive consideration (compare *Hardy v HMRC* [2011] UKFTT 592 (TC) and *Blackman v HMRC* [2016] UKFTT 465 (TC)). The Tribunal is satisfied that, in the circumstances set out above, some reduction in penalty is appropriate. The penalty notice in each case will be varied so that the penalty in each case is reduced by one third, to £520.00.

10 *Review by Revenue Scotland and reliance on the two earlier review decisions*

38. In both review requests and in the grounds of appeal in each case, Redwing rely on decisions by RS in reviews of penalty notices in two earlier cases, RS1321450, and RS1345766. In these reviews, the circumstances were that in each case an LBTT return had not been made, and as in the present appeals, that was because of the failure of the same former employee of Redwing's solicitor, which failure had come to light after her departure. Although it is not put in these terms, the argument for Redwing appears to be that RS erred in law either by not treating like cases alike, or in some sense failing to take into account relevant circumstances.

39. The taxpayer's right to request RS to review a decision is found in RSPTA, section 234. Provisions about the manner of the exercise of that right, and RS's duty to respond to a review request are found in RSTPA, sections 233-240. Section 238 makes provision about the nature of the review, and the key provisions are:

"(2) The nature and extent of the review are to be such as appear appropriate to Revenue Scotland in the circumstances.

25 (3) For the purpose of subsection (2), Revenue Scotland must, in particular, have regard to steps taken before the beginning of the review –

(a) by Revenue Scotland in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

30 (4) The review must take account of any representations made by the appellant at a stage which gives Revenue Scotland a reasonable opportunity to consider them."

40. There is no more detailed provision about the nature and extent of the review in the RSTPA. It may also be noted that RS's online factsheet "Dispute Resolution Factsheet: Review" states that:

"The review will be carried out by a member of Revenue Scotland staff with no prior involvement on the decision for which you have requested a review."

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and that

5 “[y]ou have the statutory right to make representations to the member of Revenue Scotland staff completing the review, for example, by advancing new arguments. Your representations must be taken into account by the member of staff, provided they are made at a stage when there is a reasonable opportunity to consider them. Any additional representations or presentation of new information should be made as early as possible during the review.”

10 41. It is clear that the right to request a review is apt to cover a range of circumstances, and RS has commensurately wide discretion in carrying out a review. It should be a review by a fresh pair of eyes, and its scope should be proportionate to the complexity of the case. It follows that a review should be conducted objectively, and the information available at the time of the original decision should be evaluated along with any additional information provided with the review request.

15 42. The Tribunal is not persuaded that there is any error in the approach of RS to review decisions RS1321450, and RS1345766 on the one hand, and the present cases. The Tribunal considers that there is a material difference, namely in RS1321450, and RS1345766 the returns were submitted in late May and early June 2016 (between one and two months after the employee resigned), whereas in the present cases, the returns had been submitted on 13 September and 6 October 2016 (between five and six months after the employee’s resignation). In the context of a review by RS of a decision to impose a late filing penalty, RS was entitled to conclude that difference of fact is material.

25 **Conclusion**

43. For all of the foregoing reasons, the appeals in both cases will be allowed in part. The penalty notices are varied to the extent that the penalty of £780 is in each case reduced to £520.

30 44. 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.

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Kenneth Campbell QC
TRIBUNAL MEMBER
RELEASE DATE: 17 August 2017

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Annex 1 - applicable legislation

Provisions of LBTTA relevant to this appeal:

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Section 1

The tax

(1) A tax (to be known as land and buildings transaction tax) is to be charged on land transactions.

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(2) The tax is chargeable—

(a) whether or not there is an instrument effecting the transaction,

(b) if there is such an instrument, whether or not it is executed in Scotland, and

(c) whether or not any party to the transaction is present, or resident, in Scotland.

15

...

Section 29

Duty to make return

(1) The buyer in a notifiable transaction must make a return to the Tax Authority.

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(2) If the transaction is a chargeable transaction, the return must include an assessment of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction.

(3) The return must be made before the end of the period of 30 days beginning with the day after the effective date of the transaction.

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Section 63

Meaning of “effective date” of a transaction

(1) Except as otherwise provided, the effective date of a land transaction for the purposes of this Act is—

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(a) the date of completion, or

(b) such alternative date as the Scottish Ministers may prescribe by regulations.

...

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Provisions of RSTPA relevant to this appeal:

Section 159:

(1) A penalty is payable by a person (“P”) where P fails to make a tax return specified 35 in the table below on or before the filing date (see section 82).

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	Tax to which return relates	Return
1	Land and buildings transaction tax	(a) Return under sections 29, 31, 33 or 34 of the LBTT(S) Act 2013. (b) Return under paragraphs 10, 11, 20, 22 or 30 of Schedule 19 to the LBTT(S) Act 2013.
2	Scottish landfill tax	Return under regulations made under section 25 of the LT(S) Act 2014.

(2) If P's failure falls within more than one provision of this section or of sections 160 to 167, P is liable to a penalty under each of those provisions.

5 (3) But where P is liable for a penalty under more than one provision of this section or of sections 160 to 167 which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed 100% of the liability to tax.

10 (4) In sections 160 to 167 "penalty date", in relation to a return, means the day after the filing date.

(5) Sections 160 to 163 apply in the case of a return falling within item 1 of the table.

(6) Sections 164 to 167 apply in the case of a return falling within item 2 of the table.

Section 160:

15 Land and buildings transaction tax: first penalty for failure to make return

(1) This section applies in the case of a failure to make a return falling within item 1 of the table in section 159.

20 (2) P is liable to a penalty under this section of £100.

Section 161:

Land and buildings transaction tax: 3 month penalty for failure to make return

25 (1) P is liable to a penalty under this section if (and only if)—

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

(b) Revenue Scotland decides that such a penalty should be payable, and

(c) Revenue Scotland gives notice to P specifying the date from which the penalty is payable.

5 (2) The penalty under this section 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 subsection (1)(c).

(3) The date specified in the notice under subsection (1)(c)—
10 (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 subsection (1)(a).

Section 177

Special reduction in penalty under Chapter 2

15 (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—

- (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.

20 (3) In subsection (1) the reference to reducing a penalty includes a reference to—

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

25 (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.

Section 178

30 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.

35 (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.

(3) For the purposes of subsections (1) and (2)—

- 40 (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.