

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 15

Ref: FTS/TC/AP/19/0022

Land and Buildings Transaction Tax (LBTT) – 3 year lease review return – penalty for late submission – burden of proof - reasonable excuse – Kot followed – no obligation on Revenue Scotland to remind taxpayer to file return – on facts found ignorance not an excuse – whether special circumstances present - no - appeal dismissed.

DECISION NOTICE

IN THE CASE OF

Thomson Bethune Limited

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: KENNETH CAMPBELL, QC

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 having first read the Notice of Appeal, and attachments, dated 4 September 2019 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 16 October 2019.

DECISION

Introduction

1. This appeal is against a penalty assessment notice (“the penalty”) in the sum of £100 issued by Revenue Scotland to the Appellant under Sections 159 and 160 of the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”) on 21 May 2019.
2. The penalty was imposed for failure to make a Land and Buildings Transaction Tax (“LBTT”) 3-year lease review return (“3 year LBTT Return”) timeously. The due date for filing was 15 May 2019 because the effective date of the original transaction was 15 April 2016. A return was filed by the Appellant on 26 June 2019, which was 42 days late.
3. The parties were content for the appeal to be categorised as a default paper case and for it to be decided without a hearing.

Factual Background

4. The Appellant entered into a transaction for a non-residential lease of office premises and two lock-up garages in Edinburgh. An electronic tax return relating to the transaction was submitted on 12 April 2016 by agents acting for the landlord. The LBTT return states the effective date of the transaction to be 15 April 2016. A three-year review LBTT Return was due to be filed by 15 May 2019, in terms of paragraphs 10(3) and 10(7)(a) of Schedule 19 to Land and Buildings Transaction Tax Act 2013 (“LBTTA”) and Section 82 RSTPA. No tax was payable in respect of the 3 year LBTT Return.
 5. The Appellant did not submit a 3 year LBTT Return by that filing date.
 6. Revenue Scotland says it issued a reminder to the Appellant on 6 March 2019 about the requirement to file a 3 year LBTT Return. It has produced a file copy of a letter bearing that date and addressed to the Appellant at the premises. The Appellant disputes that the reminder was received.
 7. On 21 May 2019, Revenue Scotland issued a penalty notice to the Appellant in the sum of £100. The notice was issued under Sections 159 and 160 RSTPA.
 8. On 24 May 2019, the Appellant emailed Revenue Scotland in the following terms:

“I received this and have no idea what it’s for. Can someone please email/send me a form which I will endeavor to fill in by return. When was the original form sent as I have nothing on file and would like to challenge the penalty.”
- Revenue Scotland treated this as a request for a review of the penalty.
9. On 26 June 2019, the Appellant submitted an electronic 3 year LBTT Return. It was 42 days late.
 10. Further correspondence passed between the parties in connection with the Appellant’s request for a review. On 2 August 2019, Revenue Scotland’s reviewing officer upheld the original decision to impose the penalty.

11. On 4 September 2019, the Appellant's Notice of Appeal was received by the Tribunal. On 16 October 2019, Revenue Scotland's Statement of Case and supporting documents were received by the Tribunal.

The Law

12. The requirement to file the 3 year LBTT Return is found in LBTTA at paragraph 10, Schedule 19. Relevant provisions are set out in Annex 1 to this Decision.

13. Provision is made about penalties in Sections 159 and 160 RSTPA, and the text is set out in Annex 2. The penalty in this appeal arises in consequence of those sections.

14. RSTPA contains provisions mitigating penalties in certain circumstances. Thus Section 177 RSTPA provides that "Revenue Scotland may reduce the RSTPA contains provisions mitigating penalty ... if it thinks it right to do so because of special circumstances". The full text of Section 177 is set out in Annex 2, but Section 177(3) specifies that reducing a penalty includes:

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

15. 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 2.

16. For completeness, it should be noted that Section 175 RSTPA provides that "Revenue Scotland may reduce the penalty..." where a taxpayer discloses information that has been withheld by a failure to make a return. However, there was no such disclosure in this case.

The Appellant's submissions

17. In the Grounds of Appeal, the Appellant states that it has leased the premises for 30 years, and that the landlord sold the premises in 2016, resulting in a new lease with the new landlord. The LBTT Return was submitted by the landlord's agent, but not copied to the Appellant. The Appellant paid the LBTT, but was not advised of the lodging date of the return. The Appellant submits that it therefore "had no date to follow up in 3 years' time." For those reasons, the Appellant submits the penalty should not be imposed.

Revenue Scotland's submissions

18. Reading their Statement of Case shortly, Revenue Scotland does not consider that the Grounds of Appeal disclose any basis to justify a reduction of the penalty for disclosure or special circumstances or that the penalty should be waived as a result of a reasonable excuse (see paragraph 36 of the Statement of Case).

Discussion

19. The Tribunal considered the penalty regime relating to 3-year LBTT Returns in its decisions in *Kot v Revenue Scotland*,¹ and *Qamar v Revenue Scotland*.² I agree with the analysis in those decisions, and adopt it here. From that analysis, a number of points emerge.

20. First, Revenue Scotland bears the burden of proving a penalty was properly imposed.

21. Revenue Scotland has produced a copy of the LBTT Return filed on 12 April 2016, and the 3 year LBTT Return filed on 26 June 2019. From the latter it appears that the lease has not been assigned or terminated. In the Grounds of Appeal, there is no dispute by the Appellant that it is required to file a 3 year LBTT Return. I therefore hold that the penalty was correctly imposed, and was for the correct amount.

22. The second question for decision is whether Revenue Scotland's view of the matter to the effect that there are no grounds to justify a reduction of the penalty for disclosure or special circumstances or waiver as a result of reasonable excuse should be upheld, varied or cancelled (Section 244(2) RSTPA) is correct in all the circumstances.

23. On this point, the burden of proof shifts to the Appellant. Although the legislation commences with special circumstances, it is in fact appropriate to start with consideration of reasonable excuse, because, if that is established, there is no need to consider special circumstances. As noted at paragraph 16 above, there was no disclosure in this case, so Section 175 RSTPA cannot apply.

24. There are two connected issues which arise:

(a) whether the Appellant's lack of awareness of the need to file the 3 year LBTT Return could, of itself, constitute a reasonable excuse. In other words, can ignorance of the law in the sense of ignorance of an obligation imposed by the law, constitute a reasonable excuse, and

(b) whether the suggestion, made in correspondence dated 27 June 2019 although not spelled out in the Grounds of Appeal, that Revenue Scotland had failed to tell the Appellant to file the return could amount to a reasonable excuse.

25. In *Kot*, the Tribunal analysed a body of instructive case-law giving substance to the concepts of "reasonable excuse" and "special circumstances". I gratefully adopt the analysis in paragraphs 30-38 of that decision here. I have included those paragraphs in Annex 3. I turn next to the application of those principles here.

26. In paragraph 12 above and Annex 1, I have set out the statutory provision which requires the filing of a 3-year LBTT Return, namely the LBTTA, Schedule 19, paragraph 10. From the terms of the legislation, it is clear that it is a self-assessment provision, requiring active steps by the taxpayer.

¹ [2019] FTSTC 1.

² [2019] FTSTC 3.

27. The Appellant says it was not aware of the date when the LBTT return was filed in 2016. That may well be correct. Nevertheless, it was aware of the point in time in 2016 when the new lease transaction was carried out. It was obviously a party to the lease, and it paid the LBTT.

28. In any event, from the documentation produced by Revenue Scotland, there is extensive information available on Revenue Scotland's website about the 3 year LBTT review (item 14 in the documents bundle). Contrary to the position taken by the Appellant in correspondence dated 27 June 2019, that information was available online prior to the date the return was due in this case. Had the Appellant checked Revenue Scotland's website, the requirement to file would have been clear. I conclude the Appellant did not do so.

29. What of the argument that ignorance of the law provides a reasonable excuse? The Tribunal considered this in *Kot*, and like the Tribunal in *Kot*, I adopt the observations of Judge Staker in *Julie Ashton v HMRC* to the following effect:

"In the present case, it is argued that the Appellant was unaware of her obligation under tax law ... In effect, this is a plea of ignorance of the law ... the Tribunal considers that a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what are his or her tax obligations."³

30. In my view, it is for the Appellant, as the taxpayer, to ascertain the relevant legal requirements and comply with them. On the evidence produced, the Appellant did not do that.

31. The second argument put by the Appellant in correspondence dated 27 June 2019 was that Revenue Scotland had not contacted them in the form of a reminder or otherwise. Though this was not explicitly included in the Grounds of Appeal, it was clearly live in the correspondence before the appeal was lodged. Having regard to the over-riding objective in Rule 2 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017, I consider that fairness to the Appellant makes it appropriate to consider this argument.

32. As I have noted at paragraph 6, Revenue Scotland has a record of issuing a reminder. As a matter of the general law, where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post (see the Interpretation Act 1978, Section 7). Revenue Scotland's letter was not a statutory notice, but by parity of reasoning and in the absence of compelling contrary evidence, I conclude on the balance of probability the reminder was sent to the Appellant.

33. In any event, however, it does not matter whether the Appellant received the reminder. That is because in my view, for the same reasons as the Tribunal identified in

³ [2013] UKFTT 140 (TC), para 35.

Qamar, Revenue Scotland is under no obligation to remind taxpayers about their obligations regarding the 3-year LBTT Return.⁴

34. For all these reasons, I find that the Appellant has not established that there was a reasonable excuse for the late filing.

Special circumstances

35. The law on what amounts to special circumstances was fully analysed by the Tribunal in *Straid Farm* (at paragraphs 58 to 69)⁵ and in *Kot* (at paragraphs 45 and 46). I agree with that analysis, and adopt it entirely.

36. Applying the same principles to the circumstances here, I conclude that there are no special circumstances in this appeal.

Conclusion

37. For all of the foregoing reasons, the appeal is therefore dismissed.

38. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

KENNETH CAMPBELL, QC

Legal Member

RELEASE DATE: 17 December 2019

⁴ *Qamar* at paragraphs 41-43 and 46.

⁵ *Straid Farm Ltd v Revenue Scotland* [2017] FTSTC 2.

Annex 1

Land and Buildings Transaction Tax (Scotland) Act 2013 at paragraph 10, Schedule 19

“10—...

(1) This paragraph applies where, in relation to a chargeable transaction to which this schedule applies-

(a) the buyer made a land transaction return ...

(2) The buyer must make a further return to the Tax Authority, if, on a review date, the lease—

- (a) has not been assigned, or
- (b) has not terminated (whether on the term of the lease coming to an end or otherwise).

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

(7) In this paragraph, the “review date” is-

in the case of a transaction to which sub-paragraph (1)(a) applies, the day falling on the third anniversary of the effective date of the transaction and on each subsequent third anniversary of that date...”.

Annex 2

RSTPA, sections 159 and 160

159 Penalty for failure to make returns

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

	<i>Tax to which return relates</i>	<i>Return</i>
1.	Land and buildings transaction tax	(a) Return under section 29, 31, 33 or 34 of the LBTT(S) Act 2013. (b) Return under paragraph 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.

(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.

(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.

160 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.

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

177 Special reduction in penalty under Chapter 2

(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.
- (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.
- (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.

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.
- (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)—
- (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.

Annex 3

Ms Ying Chun Kot v Revenue Scotland [2019] FTSTC 1

30. Revenue Scotland rely on *Straid* at paragraphs 42, 45, 46 and 47. However, paragraphs 43 and 44 are also relevant and we set out the relevant text of paragraphs 42-47 at Appendix 3. We agree with that reasoning.

31. We also agree with Judge Mosedale in *Welland* where she states at paragraphs 55 and 56:

“55. It must also be obvious that not every excuse is a reasonable excuse. So what did Parliament intend ‘reasonable’ to mean in these circumstances?”

56. Most Tribunal decisions have agreed that the test is objective: so whether the taxpayer in default believed that what he was doing was reasonable is irrelevant. The test measures reasonableness by an external standard and what is that external standard?”.

32. She then goes on to quote from *The Clean Car Company Limited v CEE*⁶ (“Clean Car”) and that quotation is the first part of the quotation at paragraph 46 in *Straid*. She went on at paragraph 60 to cite with approval Judge Berner in *Barrett v HMRC*⁷ at paragraph 154, which reads:

“The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard”.

We agree.

33. In the recent UK Upper Tribunal case of *HMRC v Greenisland Football Club*⁸ Mr Justice Horner referred to *Clean Car* with approval at paragraph 70 and stated that the Tribunal had “...asked the correct question...” namely:

“Was what the tax payer did an unreasonable thing for a trader of the sort envisaged...in the position the tax payer found himself, to do?”.

34. We have deliberately cited Judge Mosedale in *Welland* because she considered at some length the question of ignorance of the law as a reasonable excuse and found that lack of knowledge of the requirement to file a return did not amount to a reasonable excuse.

35. Revenue Scotland argue that ignorance of the law cannot be a reasonable excuse (or a special circumstance) and relied on paragraph 54 of *Anderson v Revenue Scotland*⁹ (“Anderson”) which reads:

“54. It is a truism that ignorance of the law is not an excuse...”.

In fact at paragraph 52 that Tribunal stated: “‘Reasonable excuse’ is not defined within RSTPA but it would not cover a lack of knowledge of the law.”

⁶ 1991 VTTR 234

⁷ 2015 UKFTT 329

⁸ 2018 UKUT 440 (TCC)

⁹ 2016 TTFT 1

36. *Welland* is one of a number of UK FTT decisions on ignorance of the law in the context of Non-Resident Capital Gains Tax (“NRCGT”) and it is fair to say there has been a diversity of views in this regard in that, for example, in *McGreevy v HMRC*¹⁰ and *Saunders v HMRC*¹¹ (which in turn had relied on *McGreevy*) the opposite view was taken. Judge Mosedale in *Welland* and also in *Hesketh v HMRC*¹² and Judge Brannan in *Hart v HMRC*¹³ disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

37. However, all of these cases and *Anderson* are decisions of a First-tier Tribunal and since they were decided, *Perrin* reviewed the law on reasonable excuse and, in particular, stated at paragraph 82:

“One situation that can sometimes cause difficulties is when the taxpayers’ asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have breached. It is a much-cited aphorism that ‘ignorance of the law is no excuse’, and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The *Clean Car Co* itself provides an example of such a situation.”

38. That makes it abundantly clear that in certain circumstances ignorance of the law can amount to a reasonable excuse.

¹⁰ 2017 UKFTT 690 (TC)

¹¹ 2017 UKFTT 765 (TC)

¹² 2017 UKFTT 871 (TC)

¹³ 2018 UKFTT 207 (TC)