

Tax Chamber
First-tier Tribunal for Scotland



[2020] FTSTC 1

Ref: FTS/TC/AP/19/0027

LBTT - 3 year lease review tax return - penalty for late submission - burden of proof - reasonable excuse - special circumstances - no - appeal dismissed

DECISION NOTICE

IN THE CASE OF

Foodwood Limited

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT, President
KATRINA LUMSDAINE, Legal 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 case) having first read the Notice of Appeal, and attachments dated 31 October 2019 and Revenue Scotland's Statement of Case, with attachments, received by the Tribunal on 10 December 2019.

DECISION

Introduction

1. This is an appeal 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 15 August 2019.
2. The penalty was imposed for failure to make a Land and Buildings Transaction Tax (“LBTT”) 3 year lease review return (the “3 year LBTT Return”) timeously. The due date for filing was 31 July 2019 because the effective date of the original transaction was 1 July 2016. A return was filed by the Appellant on 27 August 2019, which was 27 days late.
3. The parties were content for the appeal to be categorised as a default paper case and to be decided without a hearing.

The factual background

4. On 26 July 2016, the Appellant’s solicitors submitted an electronic LBTT return (reference RS1524163) in relation to the business premises in Killlearn. The LBTT return stated that the Appellant’s registered address was a Glasgow address (the “Glasgow address”). The Glasgow address is the address of the Appellant’s accountants.
5. On 22 May 2019, Revenue Scotland wrote to the Appellant at the Glasgow address reminding the Appellant that the 3 year LBTT Return was due for submission by no later than 31 July 2019 (the “Reminder letter”). It stated that penalties would be imposed if the return was not submitted on time. There was no response to the Reminder letter and it was not returned to Revenue Scotland as undelivered.
6. On 15 August 2019, Revenue Scotland issued the penalty to the Appellant at the Glasgow address and it was not returned to Revenue Scotland as undelivered.
7. On 27 August 2019, the Appellant submitted to Revenue Scotland an electronic 3 year LBTT Return. It was 27 days late. It stated that the Appellant’s registered address was an address in Buchlyvie.
8. On 27 August 2019, by email, the Appellant acknowledged to Revenue Scotland that it had received the penalty. It sought a review of the decision to impose the penalty on the basis that it had not received any requests for the 3 year LBTT Return to be submitted prior to the penalty being issued.
9. On 28 August 2019, Revenue Scotland replied to the Appellant at the Glasgow address inviting the Appellant to submit any further information in relation to the review. It enclosed a copy of the Reminder letter which had been sent to precisely the same address as the penalty.

10. That letter was returned to Revenue Scotland by Royal Mail as undelivered, on the basis that the address was incomplete.

11. On 5 September 2019, Revenue Scotland sent a copy of the letter of 28 August 2019 to the Appellant at the Glasgow address, with the addition of the words "6th floor."

12. On 12 September 2019, the Appellant replied by email acknowledging receipt of the letter and explained that the Glasgow address, with the addition of the words "6th floor", was the address of its accountants. It also advised Revenue Scotland that "We have registered our office address already from August 2016 as [the Buchlyvie address]". It also stated that it had notified the change of address to HMRC and Companies House.

13. On 19 September 2019, Revenue Scotland wrote to the Appellant at the Buchlyvie address confirming that the Glasgow address (without the words "6th floor") was the address in the LBTT return lodged by the Appellant's solicitors. Revenue Scotland confirmed its view was that the penalty for failure to submit the 3 year LBTT Return should be upheld but invited the Appellant to provide any further information if so wished.

14. By email dated 26 September 2019, the Appellant confirmed the basis of its "dispute" with Revenue Scotland, namely:

- (a) They required a reminder letter in order to keep "on top of such paperwork".
- (b) Bodies such as Stirling Council and HMRC had their amended address and communicated successfully with them.
- (c) The penalty letter had been sent to its registered address but the reminder letter was not sent to the registered address and was returned marked as incomplete.
- (d) The amount of the penalty, at £180.00, was too high, given the minimal inconvenience caused to Revenue Scotland.
- (e) As a small family run business which was struggling with difficult trading conditions, it should not be punished by the application of a penalty for an administrative document.

15. On 10 October 2019, Revenue Scotland wrote to the Appellant at the Buchlyvie address stating that it had reviewed and upheld the penalty.

16. On 28 October 2019, the Appellant wrote to the Tribunal arguing that:

- (a) The Reminder letter had never been received by it, had been sent to the principal place of business with the wrong business name and address and had been returned as "non deliverable post".
- (b) "Apparently" a reminder letter was also sent to the same address and had been returned as "undeliverable".
- (c) Revenue Scotland had then researched the Appellant's registered address and issued the penalty; they should have done so for the Reminder letter.

- (d) As HMRC, Stirling Council and others had the correct address, Revenue Scotland should have had access to it.
- (e) The penalty was far too high and could not be justified.
- (f) The high penalty imposed a burden on their cashflow.

17. On 31 October 2019, the Appellant appealed to the Tribunal enclosing copies of the correspondence from 27 August 2019 and, reiterating the earlier arguments.

18. The Appellant has not paid the penalty.

19. There is no dispute that the effective date for the original transaction was 1 July 2016 and that therefore, since the lease had not been assigned or terminated, the 3 year LBTT Return was due to be filed by no later than 31 July 2019. It was not.

The Law

20. The requirement to file the 3 year LBTT Return is found in the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTTA”) at paragraph 10, Schedule 19 which reads:

“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-

(a) 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...”.

21. The penalty arises in consequence of sections 159 and 160 RSTPA which read:

“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.
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(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."

22. Section 177 RSTPA provides 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 Appendix 1.

23. Section 177(2) specifies that "special circumstances does not include ability to pay". 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.”

24. Section 178 RSTPA provides that liability to a penalty will not arise if there is a reasonable excuse for the failure. The full text is set out at Appendix 2.

25. Section 178(3) provides that "an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control".

26. For completeness we observe 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 arguments

27. The Appellant concedes that the return was late. The Grounds of Appeal are as set out in paragraphs 14 and 16 above.

Revenue Scotland's arguments

28. Revenue Scotland submits that there is no dispute that the return was submitted late. Therefore, the penalty was correctly applied. They do 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.

Discussion

Imposition of the penalty

29. The Tribunal has looked at the penalty regime in a number of cases and in particular we considered the penalty regime for 3 year LBTT Returns in *Ying Chun Kot v Revenue Scotland*¹ ("Kot").

30. In summary, it is well established that in an appeal against a penalty, Revenue Scotland has the burden of proving that the penalty was properly imposed.

31. Revenue Scotland have produced the original LBTT return. It is clear from the terms of that return that there was a lease and the Appellant appropriately made an LBTT return. The terms of the 3 year LBTT Return show that the lease has not been either terminated or assigned.

32. From the Notice of Appeal it appears that the Appellant accepts there was an obligation to file a return. As we observed in *Kot* at paragraph 25 (adopting the comments of Judge Mosedale in *Welland v HMRC*²):

"In these circumstances, because 'the way in which the respective cases of the parties have been put' ([36] of *Brimheath*) [is that] the appellant has accepted he was liable to file the... return and failed to do so on time, I do not consider that HMRC do have to prove every pre-condition for liability to file a return."

We take the same view in regard to Revenue Scotland and the 3 year LBTT Return.

33. We have found that the return was filed late and the penalty was correctly imposed and in the correct amount specified by the law.

34. The question for decision now 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).

35. Therefore, the burden of proof now turns to the Appellant. Although the legislation commences with special circumstances, it is in fact appropriate to start with consideration of reasonable excuse, since, if that is established, there is no need to consider special

¹ [2019] FTSTC 1

² 2017 UKFTT 870 (TC) at paragraph 40

circumstances. As we indicate at paragraph 26 above, there was no disclosure in this case so that cannot apply.

Reasonable excuse

36. We set out the law on reasonable excuse at some length in *Kot* and adopt that reasoning here.

37. In essence the Appellant's case is that in the absence of a reminder they could not be expected to file the 3 year LBTT Return and it was incumbent on Revenue Scotland to contact them.

38. The first and obvious point is that Revenue Scotland did send the Reminder letter.

39. Given that the penalty notice reached the Appellant via the same address, on the balance of probability, we would have expected the Reminder letter to have done so too since it was not returned as undelivered. However, as we pointed out in paragraph 41 in *Kot*, Revenue Scotland is under no obligation to issue any reminder letters because this is a self-assessment system. Therefore, although we know that the Reminder letter was sent, even if the Appellant did not receive it for some reason, the absence of a reminder from Revenue Scotland cannot amount to a reasonable excuse.

40. The arguments about the address are a red herring. The Appellant had been professionally advised at the time of filing the original LBTT return, and the Reminder letter and the penalty were sent to the address provided by them in that return. The latter was certainly received by the Appellant via that address.

41. As we indicate in paragraph 12 above, the Appellant confirmed that it had changed its registered office in August 2016, yet no notification of that was sent to Revenue Scotland until after the last date for the 3 year LBTT Return to be filed had passed.

42. In a self-assessment regime it is the taxpayer's obligation to ensure that the relevant tax authority has up to date contact details. There is no doubt that it was the Appellant's responsibility to ensure that Revenue Scotland had the correct address at all times. They did not do so.

43. At paragraph 42 of *Kot*, we cited with approval Judge Staker in *Julie Ashton v HMRC*³ where he stated: "...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".

44. We also agree with Judge Hyde in *McCabe v HMRC*⁴ where he stated:

"The standard to be applied in determining whether a taxpayer has a reasonable excuse is that of a taxpayer with a responsible attitude to his duties as a taxpayer".

³ [2013] UKFTT 140 (TC)

⁴ [2017] UKFTT 298 (TC)

45. Documentation was produced to us to evidence that there is extensive information available on Revenue Scotland's website. Had the Appellant checked the website, it would have identified the requirement to file. Clearly, it did not do so.

46. Lastly, in this context, although it is not clear, the Appellant possibly argues that it has a reasonable excuse because it was struggling with very difficult trading conditions. Although section 178(3) RSTPA allows for a reasonable excuse where insufficiency of funds is "attributable to events outside the person's control", section 178(1) makes it clear that the alleged excuse must be the cause of the late return. That is quite simply not the case in this instance since the return was filed as soon as the penalty was received. The Appellant has established no connection between adverse trading conditions and the late return.

47. Accordingly, for all these reasons we find that the Appellant has not established a reasonable excuse for the failure to file the return on time.

Special circumstances

48. The Tribunal in *Straid Farms Limited v Revenue Scotland*⁵ sets out the law on special circumstances at some length at paragraphs 58 to 64, a copy of which we annex at Appendix 3. We adopt that reasoning.

49. We also agree with Judge Berner in *Dina Foods Limited v HMRC*⁶ where he stated at paragraph 20(3) and (4) as follows:-

"20...

(3) Lack of awareness of the penalty regime is not capable of constituting a special circumstance ...

(4) Any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties ... is not of itself capable of amounting either to a reasonable excuse or special circumstances."

50. Section 177(2) of RSTPA makes it explicit that special circumstances do not include an inability to pay so the difficult trading circumstances cannot amount to special circumstances.

51. Lastly, there is the issue of the amount of the penalty. At paragraphs 61 to 87 the Upper Tribunal in *Edwards v HMRC*⁷ reviewed in some detail the issue of proportionality of fixed penalties, albeit in relation to different penalties.

52. However, the principles, such as whether a penalty regime is a proportionate response to ensuring submission of returns and payment of tax by the due date and particularly where no tax is due, are the same.

⁵ [2017] FTSTC 2

⁶ 2011 UKFTT 709 (TC)

⁷ [2019] UKUT 131 (TCC)

53. In summary, it found that the aim of such a penalty scheme is legitimate even where no tax is due. It cannot be regarded as disproportionate even in those circumstances and therefore cannot amount to a special circumstance.

54. We find that there are no special circumstances in this appeal.

Conclusion

55. We do accept Revenue Scotland's view of the matter. We dismiss the appeal and confirm the penalty of £100.

56. 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.

ANNE SCOTT
President

RELEASE DATE: 21 May 2020

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.

***Straid Farms Limited v Revenue Scotland* [2017] FTSTC 2**

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*⁸ (“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.

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*⁹ where Jeffrey Lane LJ said at page 1216 in a much quoted passage:

“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”.

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)*¹⁰ said “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

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:

“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.

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

⁸ 2011 UKFTT 588 (TC)

⁹ 1978 1 W.L.R. 1207

¹⁰ 1971 3 All ER 967

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.