

Tax Chamber
First-tier Tribunal for Scotland



[2020] FTSTC 2

Ref: FTS/TC/AP/19/0028

LBTT - 3 year lease review tax return - penalty for late submission - burden of proof - reasonable excuse – Kot followed - ignorance of law as excuse - not on facts found - inability to pay – no - special circumstances - no - appeal dismissed

DECISION NOTICE

IN THE CASE OF

Shu Fang Yang

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: KENNETH CAMPBELL QC, Legal Member
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, Revenue Scotland’s Statement of Case, with attachments, and both parties responses.

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 30 October 2020.
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 subsequent filing was 1 October 2019 because the effective date of the original transaction was 1 September 2016. A return was filed by the Appellant on 8 November 2019 which was 38 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 9 September 2016, the Appellant’s agent submitted an electronic LBTT return (reference RS1676450) in relation to car parking spaces 670 and 671, Car Park 6 Burnbrae Drive, Paisley.
5. Revenue Scotland sent the Appellant a reminder on 6 August 2019 advising that the 3 year LBTT Return was due for submission by no later than 1 October 2019. It pointed out that penalties would be imposed if the return was not submitted on time. The Appellant did not submit the 3 year LBTT Return by 1 October 2019.
6. Revenue Scotland issued a penalty notice on 30 October 2019, which was sent to the Appellant at the same address to which the reminder had been sent.
7. On 8 November 2019 the Appellant submitted an electronic 3 year LBTT Return. It was 38 days late.
8. The Appellant did not seek a review of the decision to impose the penalty but appealed directly to the Tribunal. The date of signature of the appeal is not clear, it purports to have been signed on either 20 or 30 October 2019. In any event, it was received by the Tribunal on 21 November 2019, well within the period for appeal. She has not paid the penalty.
9. There is no dispute that the effective date for the original transaction was 1 September 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 1 October 2019. It was not.

The Law

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

11. The penalty arises in consequence of sections 159 and 160 RSTPA which reads:

“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.”

12. 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 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.”

13. 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 at Appendix 2.

14. Section 178(3) provides that “an insufficiency of funds is not a reasonable excuse unless attributable to events outside P’s control”.

15. 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

16. The Appellant does not dispute that the return was late but argues that:

- a. She is Taiwanese and is unfamiliar with the requirements of Scots law.
- b. The obligation to make the 3 year LBTT Return arises out of an investment in an airport parking scheme. That scheme has not been a commercial success for the Appellant. The promoter of the investment scheme is insolvent and is subject to proceedings by the Financial Conduct Authority. As a consequence of the issues with the investment scheme, she has not received the expected returns and may not receive an investment return. She has insufficient funds to pay taxes.

Revenue Scotland’s arguments

17. Read short, in its written Statement of Case Revenue Scotland argues it 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.

Discussion

18. The Tribunal has considered the penalty regime relating to 3 year LBTT Return in its decision in *Kot v Revenue Scotland*.¹ (“Kot”). We agree with the analysis in that decision, and adopt it here.

19. From that analysis, it is clear that Revenue Scotland bears the burden of proving a penalty was properly imposed. Revenue Scotland has produced a copy of the LBTT return from 2016, as well as the 3 year LBTT Return filed in November 2019. It is clear from those documents that there was a lease, that the Appellant made an appropriate LBTT Return in 2016, and that the 3 year LBTT Return indicates the lease has not been terminated or assigned.

20. Further, from the Notice of Appeal it appears that the Appellant accepts there was an obligation to file a 3 year LBTT Return. We agree with Judge Mosedale in *Welland v HMRC*² at paragraph 40 where, having referred to the UK Upper Tribunal decision in *Burgess & Brimheath*³, referring to the appellant’s implicit acceptance that there was a liability to file a return, she stated:

“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.”

21. We take the same view in regard to Revenue Scotland and the 3 year LBTT Return. We therefore hold that the penalty was correctly imposed and in the correct amount.

22. The next 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).

23. 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 circumstances. As we indicate at paragraph 15 above there was no disclosure in this case so that cannot apply.

Reasonable excuse

24. The issues in this appeal are:

(a) whether the Appellant’s nationality and her claim to be unaware 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 or special circumstances; and

¹ FTS/TC/AP/180008

² 2017 UKFTT 870 (TC)

³ 2015 UKUT 578 (TCC)

(b) whether the difficulties with the investment scheme in terms of which she acquired the property, the leasing of which gives rise to the requirement to lodge a 3 year LBTT Return, constitute a reasonable excuse or special circumstances.

25. In *Kot*, the Tribunal analysed a body of instructive case law giving substance to the concepts of “reasonable excuse” and “special circumstances”. We gratefully adopt the analysis in paragraphs 30-38 of that decision here. Those paragraphs are set out in Appendix 4. We turn next to the application of those principles in this case.

26. The circumstances in this case are very clear. The Appellant in this case is not a UK national but decided to “invest” in property in the United Kingdom. The Appellant was professionally advised at that time. A UK national entering into a lease in, say, Taiwan would be expected to ensure that she complied with all relevant local legislation and to take appropriate advice. So, by parity of reasoning, an overseas resident entering into an onerous obligation in Scotland might reasonably be expected to do likewise. The Appellant did so in relation to the initial transaction but does not appear to have done so thereafter. In our view, that was not objectively reasonable.

27. In paragraph 10 above, we set out the statutory provision which requires the filing of a 3 year LBTT Return, LBTTA Schedule 19, paragraph 10 and it is evident that it is a self-assessment provision, requiring active steps by the taxpayer.

28. Like the Tribunal in *Kot*, we adopt the observations of Judge Staker in *Julie Ashton v HMRC*⁴ which reads:-

“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”.

We agree.

29. It is for the Appellant to ascertain the relevant legal requirements and comply with them. On the evidence before us, she did not.

30. Revenue Scotland sent a reminder letter to the Appellant to remind her that the 3 year LBTT Return was due. Further, there is extensive information available on Revenue Scotland’s website and had she checked that she would have identified the requirement to file. Clearly, she did not do so. It matters not that this was the first time of her requiring to file a 3 year LBTT Return, or her first failure to do so.

31. Therefore, the fact that the Appellant is Taiwanese, that this was her first penalty and it was unexpected does not, in our view, amount to a reasonable excuse.

32. The second issue relied on by the Appellant is the commercial failure of the investment and the consequences which that has had on the Appellant’s ability to pay the taxes.

⁴ 2013 UKFTT 140 (TC)

33. Section 178(3) of RSTPA allows for a reasonable excuse where insufficiency of funds is “attributable to events outside the person’s control”. The Appellant’s argument couched in these terms must be that the failure of the investment is an event outwith her control.

34. In *McCabe v HMRC*⁵ Judge Hyde 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”.

35. We agree.

36. The Appellant has provided us with no evidence that she took any steps to ensure that the 3 year LBTT Return was filed within the required time. Had she done so, no penalty would have arisen. This was a matter entirely within her control. It was the fact that the 3 year LBTT Return was filed 38 days late that resulted in the penalty being issued. As set out in paragraph 7 above, no taxes were due with the filing of the 3 year LBTT Return. The Appellant has therefore not established that it acted as a taxpayer with a responsible attitude to its duties as a tax payer or that the inability to pay the penalty was attributable to an event outwith her control.

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

Special circumstances

38. The law on what amounts to special circumstances was analysed by the Tribunal in *Straid Farms Limited v Revenue Scotland*⁶ (“Straid”) (at paragraphs 58 to 69) set out at Appendix 3 and in *Kot* (at paragraphs 45 & 46) set out at Appendix 4. We agree with those analyses.

39. The Tribunal in *Straid* quoted from Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*⁷ who said that “Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

40. Section 177(2) of RSTPA sets out that special circumstances do not include an inability to pay.

41. None of the circumstances set out by the Appellant are either unusual or uncommon. We find that there are no special circumstances in this appeal.

Conclusion

47. For all of these reasons, we prefer Revenue Scotland’s view of the matter. We therefore dismiss the appeal and confirm the penalty of £100.

48. 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

⁵ [2017] UKFTT 298 (TC)

⁶ [2017] FTSTC 2

⁷ 1971 3 All ER 967

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.

KATRINA LUMSDAINE

Legal Member

RELEASE DATE: 19 June 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 overpayment 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 Ltd

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*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 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

⁸ 2011 UKFTT 588 (TC)

⁹ 1978 1 W.L.R. 1207

¹⁰ 1971 3 All ER 967

view, special circumstances encompass a situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.

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*¹¹ 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...".

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."

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.

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:

"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"...

¹¹ 2012 UKFTT 364 (TC)

Kot

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*¹² (“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*¹³ 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*¹⁴ 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*¹⁵ (“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.”

¹² 1991 VTTR 234

¹³ 2015 UKFTT 329

¹⁴ 2018 UKUT 440 (TCC)

¹⁵ 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*¹⁶ and *Saunders v HMRC*¹⁷ (which in turn had relied on *McGreevy*) the opposite view was taken. Judge Mosedale in *Welland* and also in *Hesketh v HMRC*¹⁸ and Judge Brannan in *Hart v HMRC*¹⁹ 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.

45. The Tribunal in *Straid* sets out the law on special circumstances at paragraphs 58 to 69 and the relevant text thereof is set out at Appendix 4 and we adopt that reasoning.

46. We agree with Judge Berner in *Dina Foods Limited v HMRC*²⁰ 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.”

¹⁶ 2017 UKFTT 690 (TC)

¹⁷ 2017 UKFTT 765 (TC)

¹⁸ 2017 UKFTT 871 (TC)

¹⁹ 2018 UKFTT 207 (TC)

²⁰ 2011 UKFTT 709 (TC)