

Tax Chamber
First-tier Tribunal for Scotland



[2024] FTSTC 11

Ref: FTS/TC/AP/24/0022

Land and Buildings Transaction Tax – 3 year lease review tax return – penalties for late submission – Sections 159, 160 and 161 of Revenue Scotland and Tax Powers Act 2014 – Revenue Scotland and Tax Powers Act 2014 (Amendment) Regulations 2020 – reasonable excuse or special circumstances for failure to make a return – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Alexander Benjamin Associates Ltd

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: PAUL DOYLE
CHARLOTTE BARBOUR**

The Tribunal determined the appeal on 16 December 2024 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 8 September 2024 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 13 November 2024 and the appellant's response thereto dated 14 November 2024.

DECISION

1. The Appellant is a company incorporated under the Companies Acts and having its registered office at 19 Bonnygate, Cupar, Scotland, KY15 4BU.
2. The Respondent is Revenue Scotland, a non-Ministerial Office established as a body corporate under section 2 of the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”). The Respondent is responsible for the collection and management of Land and Buildings Transaction Tax (“LBTT”).
3. This is an appeal against a decision of the Respondent to issue penalties to the Appellant under sections 159, 160 and 161 RSTPA. The Respondent issued two Penalty Assessment Notices to the Appellant in a letter dated 30 July 2024.
4. Both parties ask us to decide this appeal on the documentary evidence only.

Findings in Fact

5. The Appellant is a company incorporated under the Companies Acts, having their registered office at 19 Bonnygate, Cupar, Scotland, KY15 4BU.
6. On 1 November 2019, the Appellant entered into a 10-year lease for premises at 61 Crossgate, Cupar, Fife, KY 15 5AS (“the Property”). Solicitors submitted a LBTT return on 27 November 2019. No tax was due on the transaction.
7. The LBTT return identified the Appellant as the taxpayer and specified that one of the Appellant’s directors was Ross McGill with a correspondence address which was not the registered office.
8. Paragraph 10(1)(a) of Schedule 19 Land and Buildings Transaction Tax Act 2013 (LBTTA) applies to the lease.
9. Under paragraph 10, the Appellant must make a further return to the Respondent if, on a review date, the lease has not been assigned or terminated. The return must be not later than 30 days counting from the day after the review date. The “review date” is defined in sub-paragraph (7) as the day falling on the third anniversary of the effective date of the transaction and on each subsequent third anniversary of that date.
10. The effective date of the original lease transaction for the Property was 1 November 2019. The Appellant’s first three year lease review return was due by 1 December 2022.
11. The Respondent has said that on 13 October 2022, it issued a lease reminder letter to the correspondence address of one of the Appellant’s directors. The letter told the Appellant that a tax return was due in relation to the Property not later than 1 December 2022. The

letter explained that the Appellant must submit a lease review return to the Respondent every three years, even if nothing has changed and no tax is due. The letter also said that if the return was late, the Appellant may be charged a £100 late filing penalty, and that returns more than three months late will be charged at £10 per day for up to 90 days (ie up to a maximum of £900).

12. The Appellant's three year lease review was not submitted by 1 December 2022 and remained outstanding at 30 July 2024. The Appellant's director has said that he did not receive any reminder letter.

13. On 30 July 2024, the Respondent issued a Penalty Assessment Notice to the Appellant. The notice contained a penalty ("the First Penalty") for £100 for a failure to submit a return on time under sections 159 and 160 RSTPA.

14. On 30 July 2024, the Respondent also issued a second Penalty Assessment Notice to the Appellant ("the Second Penalty") for £900 for failure to submit a return after three months under sections 159 and 161 RSTPA. The Second Penalty had accrued at a daily rate of £10 for a period of 90 days.

15. On 20 August 2024, the Respondent received an email response from one of the Appellant's directors. He complained that he had not received any reminders, and that the Respondent had taken a long time to bring the overdue three yearly return to his attention. He did not ask for a review of the Respondent's decision.

16. On 12 September 2024, the Appellant appealed the Penalty Assessment Notices dated 30 July 2024.

17. The Appellant appealed to this Tribunal on 12 September 2024, however, the appeal was late. The Tribunal considered whether to accept a late appeal, and agreed to do so, because of the Appellant's lack of awareness of the timescales and his difficulties with completing forms. It was noted that it was only two weeks late.

The area of dispute

18. In the Notice of Appeal, the Appellant says:

"There was no exceptional circumstances. We have been fined £1,000 for a form that wasn't filled in. A bill was sent 2 years after non-filing. If the form was sent it would have been filed and ZERO charge due.

The Decision to fine people a ridiculous amount of money for a non-filing of a form is mind blowing.

The property falls under Small Business Relief so why the unnecessary paperwork is needed is beyond me.

We never received the form or reminder so no charge should be incurred !!!”.

19. The Respondent says that the Appellant cannot establish a reasonable excuse for failure to make a return for the purposes of section 178 RSTPA, nor does the Appellant establish special circumstances which would justify a reduction in the amount of penalties due.

The Law

20. The relevant law is contained in sections 159, 160 and 161 of RSTPA.

Analysis

21. The Appellant says there has been procedural irregularity. The Appellant says that they have been treated unfairly and if the Respondent had issued a correctly addressed reminder they would have made the lease review return on time. The Appellant says the fine is disproportionate.

22. There is no dispute about the central facts of the case. The three year lease review return was due on 1 December 2022. It is an agreed fact that the three year lease review was not submitted on time. Both sections 159 and 160 apply, which means the Appellant is liable to pay the first penalty of £100.

23. The Appellant’s appeal proceeds almost entirely on an argument that the Respondent has a duty to send a reminder before a lease review return is due. The fundamental problem with that argument is that it has no foundation in law. The Respondent is not under any duty to send reminders about the need to send a three yearly review return. The law requires LBTT and associated filing obligations to be self-assessed.

24. Section 161 RSTPA provides that if a failure to make a return continues after the end of the period of three months after the month beginning with the penalty date, a person is liable for a further penalty of £10 for each day that the failure continues during the period of 90 days beginning with the day after the end of the period described in section 161(1)(a).

25. The Appellant’s failure to submit a return continued beyond the three month section 161(1)(a) period. The Appellant is liable to a penalty of £10 per day for the period beginning with the day after the end of the section 161(1)(a) period. That is £900 in total.

26. The Revenue Scotland and Tax Powers Act 2014 (Amendment) Regulations 2020 deal with failure to make a tax return where the filing date occurs on or after 11 March 2020

(item 1 of the table in section 159 RSTPA). The effect of the Regulations is that there is no need for a notification to be made under section 161 before an assessment can be made under section 179.

27. The only competent arguments left to the Appellant are:

- (i) Reasonable excuse; and
- (ii) Special circumstances.

Reasonable Excuse

28. Section 178 RSTPA provides that if a person satisfies the Respondent that there is a reasonable excuse for failing to submit a return, liability to a penalty does not arise.

29. The Appellant says in the notice of appeal that there was no exceptional circumstances (paragraph 18 above) which we read as being no reasonable excuse.

30. The Appellant also says that a lack of communication from the Respondent led to the penalty notices because the Appellant only became aware of the late filing in July 2024, after receipt of the Penalty Assessment Notice. The Appellant says that if it had been contacted, the return would have been completed and submitted on time. The Appellant says that it did not know a return was due, and, in any event, there is no liability for LBTT.

31. The Respondent said it sent a reminder letter, to the correspondence address of one of the Appellant's directors, on 13 October 2022. However, whether or not the Appellant received reminders is irrelevant. LBTT is a self-assessed tax. The Respondent is not required to notify a taxpayer of their responsibility to submit a tax return. Forgetfulness is not a reasonable excuse. The Appellant does not have a reasonable excuse for failing to submit the returns on time.

32. Section 178(3)(b) RSTPA stipulates that reliance on a third party cannot be a reasonable excuse unless the Appellant took reasonable care to avoid the failure. The Appellant did not produce sufficient reliable evidence of reasonable care to avoid the failure. The Appellant does not blame a third party. His argument boils down to an argument that the Penalty Assessment Notices are unfair and disproportionate.

33. The Appellant had advice when they originally took the lease of the Property. The original LBTT return was submitted on time.

34. The Appellant does not establish reasonable excuse.

Special circumstances

35. Section 177 RSPTA permits the Respondent to reduce a penalty if it thinks it is right to do so because of special circumstances.

36. The Appellant says that the Penalty Assessment Notices came as a shock because they did not know a review return was due, and that imposition of penalties is unfair. The true focus of the Appellant's argument is that the level of penalty is harsh and disproportionate. The Appellant wants, at least, a reduction in the level of the penalty.

37. "Special circumstances" is not defined in RSTPA, but guidance is found in case-law.

38. In a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)* 1971 3 All ER 967 said:

"Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

39. The expression "special circumstances" was considered in relation to employment law in the decision of the Court of Appeal in *Clarks of Hove Limited v Bakers Union* 1978 1 WLR 1207 in which Jeffrey Lane LJ said [at 1216]:

"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".

40. More recently, the meaning of the expression "special circumstances", in Schedule 24 Finance 25 Act 2007, was examined by the Tribunal in *Collis v HMRC* [2011] UKFTT 588 (TC) in which the Tribunal said [at 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".

41. Unfortunately, none of the circumstances set out by the Appellant are either unusual or uncommon.

42. Section 177(2)(a) of RTSPA provides that "special circumstances" do not include an inability to pay.

43. In *HMRC v Total Technology* 2012 UKUT 418 (TCC) the Upper Tribunal stated [at 74]:

"We turn then to the question whether proportionality is to be assessed at a high

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

44. The Upper Tribunal went on to say [at 76] that:

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

45. We cannot be concerned with the penalty scheme as a whole but must confine ourselves to looking at the penalty at an individual level.

46. In circumstances in which the Appellant has not submitted a return for the Property, we cannot find the penalties to be disproportionate when balanced against the objective of the relevant legislative provisions to ensure timeous returns.

47. We do not find the penalty imposed, in these circumstances, to be harsh and unfair nor an excessive burden.

48. More generally, it is well established that the Tribunal’s jurisdiction and powers are only those that are given to it expressly by statute and that it does not have jurisdiction to consider issues of fairness in determining the matter in question.

49. Section 244(2) RSTPA provides that:-

“The Tribunal is to determine the matter in question and may conclude that Revenue Scotland’s view of the matter in question is to be:-

- (a) Upheld,
- (b) Varied, or
- (c) Cancelled.”

50. In *HMRC v Hok* [2012] UKUT 363 (TCC) the Upper Tribunal reiterated that the First-tier Tribunal’s jurisdiction is limited to those functions conferred on it by statute. At [56-58] of that decision the Upper Tribunal said:

“56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and

can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.

57. If that conclusion leaves 'sound principles of the common law ... languishing outside the Tribunal room door', as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.

58. It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed. The appeal is allowed and we determine that all five of the penalties are due."

51. In *Dr Goudie and Dr Sheldon v Revenue Scotland* [2018] FTTSC 3, the Tribunal, having quoted as above from the Upper Tribunal in *Hok* found [at 67] that "This Tribunal does not have jurisdiction to consider...fairness."

52. On the facts as we find them to be, the Appellant does not have a reasonable excuse for failure to submit the three year lease review. On the facts as we find them to be, the Appellant cannot establish special circumstances which would merit a reduction in penalty.

Decision

53. The appeal is dismissed.

54. The Respondent's penalties (under sections 159, 160 and 161 RSTPA) issued in Assessment Notices to the Appellant on 30 July 2024 are confirmed.

Right of Appeal

55. 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.

PAUL DOYLE
Legal Member

RELEASE DATE: 23 December 2024