

Tax Chamber
First-tier Tribunal for Scotland



[2018] FTSTC 2

Ref: FTS/TC/AP/17/1004

***Land and Buildings Transaction Tax (LBTT) – sections 168 and 169(2)
Revenue Scotland Tax and Powers Act (RSTPA) – is a penalty of 5%
excessive – no – proportionate – appeal dismissed***

DECISION NOTICE

IN THE CASE OF

ERNOLD LIMITED

Appellant

- and -

REVENUE SCOTLAND

Respondent

**TRIBUNAL: ANNE SCOTT – President
CHARLOTTE BARBOUR – Ordinary Member**

The Tribunal determined the appeal on 22 January 2018 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 28 September 2017, and Revenue Scotland's Statement of Case, with attachments dated 23 November 2017.

DECISION

Introduction

- 5 1. This is an appeal against a decision of Revenue Scotland that the appellant is liable to a penalty of £1,527 for failure to pay Land and Buildings Transaction Tax ("LBTT") timeously. The penalty was assessed under Sections 168 and 169(2) of Revenue Scotland and Tax Powers Act 2014 ("RSTPA").
- 10 2. At the same time the appellant was assessed to a penalty of £100 for failure to make a return timeously in terms of Sections 159 and 160 RSTPA. That penalty is admitted and has not been appealed.
- 15 3. In addition the Penalty Assessment Notice levied interest of £94 on the unpaid tax in terms of Section 217 RSTPA.

Background

- 20 4. It is not disputed that both the return and the payment were late. It is simply the quantum of the penalties for the failure to make payment of the tax due timeously that is in dispute.
- 25 5. The appellant entered into a transaction to acquire a property in Glasgow and the LBTT return states the effective date of the transaction to be 18 April 2017. The filing date for that return was therefore 18 May 2017. The payment date was the same date. That is not in dispute.
- 30 6. The return was submitted 41 days late on 28 June 2017 and the outstanding tax in the sum of £30,550 was also paid on the same day together with a payment of £100 which was assumed to have been in anticipation of the late filing penalty.
- 35 7. The explanation offered for the late submission of the return, and presumably the late payment, although that is not explicit, was that the appellant did not have the funds to settle the Additional Dwelling Supplement as at the due date.
- 40 8. On 4 July 2017, Revenue Scotland issued the Penalty Assessment Notice encompassing the two penalties and interest in the sum of £94. The interest was paid on 14 September 2017.
- 45 9. The only explanation offered at any stage for this appeal was that:-
- “(1) It is accepted that a penalty of £100 is due for late submission of the LTR as the funds to serve the ADS were not available until after 18.05.17.
- (2) However, it is considered that the penalty of £1,527 (5% of the LBTT and ADS is excessive in the circumstances and should be reduced significantly.”
- 50 10. The appellant declined to offer further evidence or submissions following receipt of Revenue Scotland's Statement of Case.

11. The relevant legislation is not in dispute and is set out in full at Appendix 1. In summary, if tax is paid late, in the first instance, the penalty liability is 5% of the unpaid tax. It then rises to 10% and lastly 15%.

5 Discussion

12. It is not disputed that the payment was late. Therefore in terms of Section 169(2) the appellant is liable to a penalty of 5% of the unpaid tax and the penalty has been correctly calculated at £1,527. Sections 169(3) and (4) do not come into play since the tax was relatively promptly paid, albeit late.

13. The Scottish Parliament has balanced the interest of the taxpayer with those of the Exchequer. A taxpayer may be spared a penalty if the taxpayer has an excuse, but the excuse must be a reasonable one. Similarly if there are special circumstances that apply then the penalty can be remitted, suspended or compromised.

14. The onus of proof in regard to both reasonable excuse and special circumstances lies with the appellant. No excuse has been offered beyond insufficiency of funds. As can be seen from paragraph 178(3)(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control. Neither Revenue Scotland nor we have been furnished with any reason as to why the appellant did not have the funds on the date for payment. A simple insufficiency of funds cannot suffice. Accordingly we find that no reasonable excuse has been established.

15. We therefore turn to the question of special circumstances. Again Section 177(2) makes it explicit that special circumstances does not include ability to pay so that cannot apply.

16. As we explained in paragraph 30 in *Straid Farms Ltd v Revenue Scotland*¹ ("Straid")

"...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'".

17. Special circumstances is not defined in RSTPA but Revenue Scotland rely on the decision of the Tribunal in *Straid* at paragraphs 61 to 63 which read as follows:

"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*² 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'.

¹ 2017 FTSTC 2

² 1978 1 W.L.R. 1207

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)*³ said ‘Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’.

5 63. The meaning of the expression special circumstances, in Schedule 24 Finance Act 2007, was examined by the UK Tribunal in *Collis*⁴ 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.

10 18. Unsurprisingly, we adopt that reasoning in this appeal. However at paragraph 64 in *Straid*, the Tribunal went on to state “Accordingly, in our view, special circumstances encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.”

15 19. In this appeal it is possible that the appellant’s argument that the penalty is excessive is predicated on that thinking.

20 20. However, in *Straid* at paragraph 65 the Tribunal stated “... as was decided in *White v HMRC*⁵ at paragraph 70 ‘... special circumstances must relate to matters which cannot be taken into account in the reduction set out in the statute ...’”. Since insufficiency of funds is set out in RSTPA then that cannot be taken into account.

25 21. In *Anderson v Revenue Scotland* (“Anderson”) at paragraph 25, Revenue Scotland is reported as having argued that the penalty regime has a series of checks and balances whereby there is provision for mitigation of penalties in the light of individual circumstances and that that struck an appropriate balance between fairness to the individual and the interests of the community in running an efficient and effective tax regime. That argument was advanced in the context of proportionality and the only possible remaining argument for the appellant is that the penalty in this instance is disproportionate.

30 22. In the context of proportionality, Revenue Scotland rely on the four stage criteria expounded by Lord Sumption at [20] in *Bank Mellat v HM Treasury*⁶ (“Mellat”) and that reads:

35 “Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used, and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the
40 same facts are likely to be relevant to more than one of them.”

In this case they do overlap and therefore we look at them in the round.

³ 1971 3 All ER 967

⁴ 2011 UKFTT 588 (TC)

⁵ 2012 UKFTT 364 (TC)

⁶2013UKSC 39

23. Because of the said overlap of these factors, we also refer to the dicta of Simon Brown LJ in the very well known case of *International Transport Roth GmbH v Secretary of State for the Home Department*⁷ (“Roth”) where he sets out the test for assessing proportionality at paragraph 26 as follows:

5 “...it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?”

10 That is a high threshold which must be surmounted before a court or tribunal can find that a penalty that has been correctly levied in terms of relevant legislation is disproportionate. It is almost routinely cited by HMRC in UK tax penalty cases.

24. What would be so plainly unfair? The Court in *James and Others v United Kingdom*⁸ (“James”) at paragraph 50 said that the “fair balance” that was required would protect individuals from having to bear “an individual and excessive burden”.

15 25. We accept that the good administration of the tax system does rely on those who fall within it to comply with their legal obligations and that it is for that reason that there is a penalty regime.

20 26. We know and accept that the Scottish Parliament, like every other legislature considering Article 1 to the First Protocol (“A1P1”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms enjoys a wide margin of appreciation. *James* at paragraph 46 makes it explicit that that is the case unless that which is at issue is “manifestly without reasonable foundation” and therefore not in the public or general interest.

25 27. In *Anderson* it is reported at paragraph 19 that Revenue Scotland accepts that if A1P1 were to be engaged then that could be considered as a special circumstance in terms of Section 177 RSTPA, albeit it was not in that case.

30 28. We must therefore ask: What is the policy objective?

35 29. The Policy Memorandum for RSTPA makes it clear at paragraph 103 that the purpose of penalties is “... to promote compliance and deter non-compliance”. Of course, the objective of each and every penalty provision is to promote compliance and deter non-compliance. The list of non-compliant behavior is set out at paragraph 103 of the Policy Memorandum and the second item is a failure to make a tax payment on time.

40 30. Paragraph 10 of the Policy Memorandum makes it explicit that the policy objective was that there would be “... three kinds of financial penalties for non-compliant behavior – fixed penalties, daily penalties and percentage based penalties where the penalty is linked to the potential loss in tax revenues”.

31. Paragraph 105 goes on to explain that:

⁷ [2003] QB 728

⁸ 1986 8 EHRR 123

“The expectation is that the different types of penalties will form a hierarchy, with the mildest being the fixed penalties and the most serious being penalties based on a percentage of the tax calculated as being due”.

5 32. It is very clear, both from the Policy Memorandum and the explicit wording in
RSTPA that, following consultation, the Scottish Parliament intended penalties to start at
15 5% of the outstanding tax, where tax was not paid on time, and thereafter to rise to a
maximum of 15%. The compliance intention is very clearly to ensure that returns are filed
on time and tax paid on time. The penalty calculated by reference to a percentage of the
10 tax due is expressly pitched at a level to maximise compliance.

33. Like the Tribunal in *Anderson* we find that the penalty applied is not “devoid of a
reasonable foundation”.

15 34. The imposition of penalties is rationally connected to the policy objective in that it
encourages compliance and the powers to mitigate allow a balance to be struck between
the Exchequer and taxpayers.

20 35. The scheme of the legislation as a whole is not so plainly unfair that it cannot be
permitted given the policy objective. As for this taxpayer, we observe that the delay of 41
days occurred in a context where penalties must be paid within 30 days of being issued
(Section 179 RSTPA) and the tax itself should have been paid within 30 days beginning
the day after the effective date of the transaction. The period of 41 days thereafter is
therefore not insignificant.

25 **Conclusion**

30 36. We uphold Revenue Scotland’s view of the matter. The penalty of £1,527, which
has been correctly calculated in accordance with the clear wording of the legislation, is
upheld.

35 37. 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 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.

40 **ANNE SCOTT**
President

RELEASE DATE: 1 February 2018

Legislation

5 Revenue Scotland and Tax Powers Act 2014

168 Penalty for failure to pay tax

10 (1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax mentioned in column 3 of the following table on or before the date mentioned in column 4 of the table.

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty incurred</i>
1.	Land and buildings transaction tax	<p>(a) Amount payable under section 40 of the LBTT(S) Act 2013.</p> <p>(b) Additional amount payable as a result of an adjustment under section 66 of this Act.</p> <p>(c) Additional amount payable as a result of an amendment under section 83 of this Act.</p> <p>(d) Additional amount payable as a result of an amendment under section 87 of this Act.</p> <p>(e) Additional amount payable as a result of an amendment under section 93 of this Act.</p> <p>(f) Amount assessed under section 95 of this Act in the absence of a return.</p> <p>(g) Amount payable as a result of an assessment under section 98 of this Act.</p>	<p>(a), (d) and (f) The date falling 30 days after the date by which the amount must be paid.</p> <p>(b), (c), (e) and (g) The date by which the amount must be paid.</p>

15 (2) If P’s failure falls within more than one provision of this section or of sections 169 to 173, P is liable to a penalty under each of those provisions.

(3) In sections 169 to 173 “penalty date”, in relation to an amount of tax, means the day after the date mentioned in or for the purposes of column 4 of the table in relation to that amount.

5 (4) Section 169 applies in the case of a payment falling within item 1 of the table.

(5) Sections 170 to 173 apply in the case of a payment falling within item 2 of the table.

10 **169 Land and buildings transaction tax: amounts of penalties for failure to pay tax**

(6) This section applies in the case of a payment of tax falling within item 1 of the table in section 168.

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(7) P is liable to a penalty of 5% of the unpaid tax.

(8) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

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(9) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

25 **177 Special reduction in penalty under Chapter 2**

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(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—

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(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.

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

(a) remitting a penalty entirely,

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(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.

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(5) The powers in this section also apply after a decision of a tribunal or a court in relation to the penalty.

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178 Reasonable excuse for failure to make return or pay tax

- 5 (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.
- 10 (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)—
- 15 (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
- 20 (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.