



[2019] FTSTC 1

Ref: FTS/TC/AP/18/0008

LBTT - 3 year lease review tax return - penalty for late submission - burden of proof - reasonable excuse - ignorance of the law - Anderson distinguished - Ignorance of the law can be an excuse but is not on facts found - special circumstances - no - appeal dismissed

DECISION NOTICE

IN THE CASE OF

Ms Ying Chun Kot

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT, President
KATRINA LUMSDAINE, Legal Member**

The Tribunal determined the appeal on Thursday 17 January 2019 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 2018 and Revenue Scotland's Statement of Case, with attachments, dated 9 November 2018.

DECISION

Introduction

- 5 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 13 September 2018.
- 10 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 9 September 2018 because the effective date of the original transaction was 10 August 2015. A return was filed by the appellant on 24 September 2018 which was 15 days late.
- 15 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

- 20 4. On 18 August 2015, the appellant's agent submitted an electronic LBTT return (reference RS0442981) in relation to Plots 341 and 342, Park First Glasgow, Car Park 2, Burnside Place, Paisley, Glasgow.
- 25 5. Revenue Scotland sent the appellant a reminder on 14 June 2018 pointing out that the 3 year LBTT Return was due for submission by no later than 9 September 2018. It pointed out that penalties would be imposed if the return was not submitted on time. There was no response.
- 30 6. In the absence of submission of that return, on 13 September 2018, the penalty was issued to the appellant at the same address to which the reminder had been sent.
- 35 7. The appellant did not seek a review of the decision to impose the penalty but appealed directly to the Tribunal on 28 September 2018. She has not paid the penalty nor the interest arising thereon.

- 40 8. There is no dispute that the effective date for the original transaction was 10 August 2015 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 9 September 2018. It was not.

Preliminary issue

- 45 9. The LBTT return stated the following salient facts:
- (a) The effective date of the transaction is 10 August 2015.
 (b) The primary buyer was the appellant.
 (c) The appellant's tax reference was stated to be K00140225.
 (d) The buyer and seller were not connected.
 (e) The appellant's agent was a company.

- (f) The primary seller was described by the same name as the appellant and with the same address but with the agent being a firm of solicitors.
- (g) The local authority number for the property was 9075: Renfrewshire.
- (h) The Title Number was REN135526.
- 5 (i) The address was plots 341 and 342.
- (j) The termination date of the lease was 31 January 2189.
- (k) The annual rent of the lease was £100.
- (l) The premium for the lease was £40,000.
- 10 10. The 3 year LBTT Return, which was received by Revenue Scotland on 24 September 2018, stated the following salient facts:-
- (a) The effective date of the transaction is 10 August 2015.
- (b) The primary tenant was the appellant.
- 15 (c) The appellant's tax reference was described as KJ0535482.
- (d) The local authority number was given as 9067: Glasgow.
- (e) The Title Number was REN138444.
- (f) The address was 341 and 342.
- (g) The termination date of the lease was stated as 9 August 2190.
- 20 (h) The annual rent was described as £3,000.
11. As can be seen there are major unexplained discrepancies, none of which have been addressed by the parties. Are they material to this appeal?
- 25 12. We had due regard to Rule 2 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") which reads as follows:
- "Overriding objective and parties' obligations to co-operate with the First-tier Tribunal**
- 30 2.—(1) The overriding objective of these Rules is to enable the First-tier Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case in accordance with the overriding objective includes—
- 35 (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated expenses and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- 40 (d) using any special expertise of the First-tier Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The First-tier Tribunal must seek to give effect to the overriding objective when it—
- 45 (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.
- (4) Parties must, insofar as reasonably possible—
- 50 (a) help the First-tier Tribunal to further the overriding objective; and
- (b) co-operate with the First-tier Tribunal generally."
13. Whilst the discrepancies which we have identified may well give rise to other issues and would be relevant for any subsequent 3 year LBTT Return nevertheless the penalty in this case is only £100 and relates to the failure to file the 3 year LBTT Return due by

9 September 2018 timeously. Whether or not that return is accurate or inaccurate, it was not filed by the due date. Therefore, even if it is entirely inaccurate to the extent that it does not comply with the requirement to file the 3 year LBTT Return, as required by law, that does not affect the question of liability, or not, for a penalty.

- 5 14. In those circumstances we decided that it was proportionate to draw these discrepancies to the parties' attention but to proceed with the appeal.

The Law

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

“10—...

- 15 (1) This paragraph applies where, in relation to a chargeable transaction to which this schedule applies—
 (a) the buyer made a land transaction return ...

- 20 (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).

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

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

30 (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....”.

- 35 16. The penalty arises in consequence of sections 159 and 160 RSTPA which read:

“159 Penalty for failure to make returns

- 40 (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.

- 45 (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.

- 45 (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.
- 5 (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

- 10 (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.”

15 17. 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:

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

25 18. 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.

30 19. 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.

Appellant’s arguments

35 20. The appellant concedes that the return was late but argued that:

“I didn’t receive any letter, email or notice from Revenue Scotland about the return before the penalty notice. I didn’t know the deadline to submit the return.”

40 She lives in Hong Kong and alleged that she did not know about Scotland’s taxation system.

Revenue Scotland’s submissions

45 21. Revenue Scotland 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

50 22. Although the basis for the penalty in that case was different, the penalty regime in RSTPA and the Tribunal’s jurisdiction was discussed at some length in *Straid v Revenue Scotland*¹ (“Straid”) and we adopt that analysis here. However, this is the first appeal in

¹ 2017 FTSTC 2

relation to a penalty relating to a 3 year LBTT Return and there are issues in this appeal that did not arise in *Straid*.

5 23. It is well established that in an appeal against a penalty, Revenue Scotland has the burden of proving that the penalty was properly imposed. As Judges Herrington and Poole in the UK Upper Tribunal in *Perrin v HMRC*² ("Perrin") made clear at paragraph 69:

10 "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, *prima facie*, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of 'reasonable excuse' becoming relevant."

15 24. Revenue Scotland have produced the original LBTT return and it is clear from the terms thereof that there was a lease, the appellant appropriately made an LBTT return and the terms of the 3 year LBTT Return indicate that the lease has not been either terminated or assigned.

20 25. Further, in this case it appears that the appellant accepts that, in principle, she was liable to the penalty. We agree with Judge Mosedale in *Welland v HMRC*³ at paragraph 40 where, having referred to the UK Upper Tribunal decision in *Burgess & Brimheath*⁴, referring to the appellant's implicit acceptance that there was a liability to file a return, she stated:

30 "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.

26. We have found that the penalty was correctly imposed and in the correct amount.

35 27. 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).

40 28. 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 19 above there was no disclosure in this case so that cannot apply.

² 2018 UKUT 156 (TC)

³ 2017 UKFTT 870 (TC)

⁴ 2015 UKUT 578 (TCC)

Reasonable excuse

29. The issues here, which are linked, are:

- 5 (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 that Revenue Scotland had failed to tell her to file the
return could amount to a reasonable excuse.

10 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.

15 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?

20 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?".

25 32. She then goes on to quote from *The Clean Car Company Limited v CEE*⁵ ("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*⁶ at
paragraph 154, which reads:

30 "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".

35 We agree.

33. In the recent UK Upper Tribunal case of *HMRC v Greenisland Football Club*⁷
Mr Justice Horner referred to *Clean Car* with approval at paragraph 70 and stated that
the Tribunal had "...asked the correct question..." namely:

40 "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?".

45 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.

⁵ 1991 VTTR 234

⁶ 2015 UKFTT 329

⁷ 2018 UKUT 440 (TCC)

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*⁸ ("Anderson") which reads:

5 "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."

10 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*⁹ and *Saunders v HMRC*¹⁰ (which in turn had relied on *McGreevy*) the opposite view was taken. Judge Mosedale in *Welland* and also in *Hesketh v HMRC*¹¹ and Judge Brannan in *Hart v HMRC*¹² disagreed with the decisions in *McGreevy* and *Saunders* and declined to follow them.

15 20 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:

25 "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."

30 35 38. That makes it abundantly clear that in certain circumstances ignorance of the law can amount to a reasonable excuse.

40 45 39. 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, Singapore would be expected to ensure that s/he complied with all relevant local legislation and to take appropriate advice. It would appear that this appellant did not do so. That was not objectively reasonable.

40 45 40. Furthermore, the appellant provided us with no evidence to demonstrate any prudent or reasonable steps that she took to familiarise herself with the relevant legislation. Indeed, she did not suggest that she took any steps at all to ascertain her tax obligations. At a basic level we are aware that there is extensive information available on Revenue

⁸ 2016 TTFT 1

⁹ 2017 UKFTT 690 (TC)

¹⁰ 2017 UKFTT 765 (TC)

¹¹ 2017 UKFTT 871 (TC)

¹² 2018 UKFTT 207 (TC)

Scotland's website and had she checked that she would have identified the requirement to file. Clearly she did not do so.

41. The second issue was the suggestion that Revenue Scotland had not contacted her.

5 Revenue Scotland did issue a reminder, as indicated in paragraph 5 above, and to the same address as that to which the penalty was issued. On the balance of probability the reminder would have been received by the appellant. In our view it matters not whether the appellant received the reminder issued by Revenue Scotland because Revenue Scotland is under no obligation to remind taxpayers about their obligations since this is a self-assessment system.

10 42. At paragraph 66 of *Welland* Judge Mosedale cites with approval Judge Staker in *Julie Ashton v HMRC*¹³ which reads:-

15 "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".

20 We agree.

43. It is for the appellant to ascertain the relevant legal requirements and honour those. She did not.

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

Special circumstances

30 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*¹⁴ where he stated at paragraph 20(3) and (4) as follows:-

35 "20...

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

40 (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."

47. We agree and we find that there are no special circumstances in this appeal.

Conclusion

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

¹³ 2013 UKFTT 140 (TC)

¹⁴ 2011 UKFTT 709 (TC)

49. 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.
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ANNE SCOTT
President

RELEASE DATE: 6 February 2019

APPENDIX 1

177 Special reduction in penalty under Chapter 2

- 5 (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—
- 10 (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—
- 15 (a) remitting a penalty entirely,
(b) suspending a penalty, and
(c) agreeing a compromise in relation to proceedings for a penalty.
- 20 (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.
- 25

Appendix 2

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.

Appendix 3

Straid

42. The Scottish Parliament has balanced the interests 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.
- 5
43. As we indicate above reasonable excuse is not defined in RSTPA. In interpreting a statutory provision, it is necessary to have regard to the purpose of the particular provision and, insofar as possible, interpret its language in a way which gives effect to that purpose. The recent case of *UBS AG v HMRC*¹⁵ makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically.
- 10
44. The concept of reasonable excuse is not confined to RSTPA and is to be found in the general tax law in the United Kingdom and in many other statutory contexts, particularly in the criminal law.
- 15
45. Lord Rodger of Earlsferry at paragraph 81 in *R v G*¹⁶ says:
- 20
- “... So the courts have recognised that any decision on whether an accused had a reasonable excuse must depend on the particular circumstances of case ... whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case”.
- 25
46. The test articulated by Judge Medd in *The Clean Car Company Limited v CEE*¹⁷ has recently been approved in the context of Social Security legislation by Judge Rowland in *VT v SSWP*¹⁸. Judge Medd said:-
- 30
- “...the test of whether there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do... the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer ... such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously ... many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse”.
- 35
47. Accordingly it is incumbent on the Tribunal to look at the appellant's individual circumstances and at the underlying cause.
- 40

¹⁵ 2016 UKSC 13

¹⁶ 2009 UK HL 13

¹⁷ 1991 VTTR 234

¹⁸ 2016 UKUT 178 (AAC)

Appendix 4

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*¹⁹ ("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 ...".
- 5 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.
- 10 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.
- 15 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*²⁰ 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".
- 20 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)*²¹ said "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".
- 25 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".
- 30 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 view, special circumstances encompass a situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.

¹⁹ 2011 UKFTT 588 (TC)

²⁰ 1978 1 W.L.R. 1207

²¹ 1971 3 All ER 967

5 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*²² 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...".

10 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.

15 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."

16 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.

20 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"...