



[2019] FTSTC 16

Ref: FTS/TC/AP/19/0017

Land and Buildings Transaction Tax – Penalty of late payment of LBTT – whether penalty correctly imposed - yes – whether reasonable excuse - no – whether special circumstances - no - whether amount of penalty proportionate – yes - different approach by HMRC relevant – no – whether Tribunal can consider fairness of legislation – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

The Barony of Kirkton Ltd

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT, President
KATRINA LUMSDAINE, Legal Member

The Tribunal determined the appeal without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (default paper cases) having first read the Notice of Appeal, and attachments, dated 18 July 2019 and Revenue Scotland’s Statement of Case, and attachments, received by the Tribunal on 29 August 2019 and the appellant’s response thereto dated 4 October 2019.

DECISION

Introduction

1. This is an appeal against a penalty of £318 (“the penalty”) contained in a penalty assessment notice issued by Revenue Scotland to the Appellant under Sections 168 and 169 of the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”) on 26 March 2019.
2. The penalty was imposed because the Appellant had not paid Land and Buildings Transaction Tax (“LBTT”) on the due date for payment.
3. There is no dispute between the parties in regards to:
 - (a) The factual background to the case;
 - (b) The relevant legislative provisions; and
 - (c) The fact that the penalty has been correctly calculated at the rate of 5% of the tax that was due and payable.
4. In the Decision, we therefore summarise only the directly relevant facts and legislative provisions although we annex at Appendix 1 the full text of the relevant legislation.

The factual background

5. The Appellant instructed solicitors, John Jackson and Dick, (“the agent”) to act as its agent.
6. The Appellant purchased a number of non-residential properties in South Lanarkshire. Although, the Appellant, in its Notice of Appeal refers to ten linked transactions, the electronic LBTT return submitted by the agent on 19 September 2018 disclosed that there were eight properties and the LBTT was calculated on that basis.
7. The effective date of the transaction was 7 September 2018.
8. In terms of Section 40(2) of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTFTA”), payment of LBTT is due at the same time as the return is submitted. Section 40(4) LBTFTA states that “...tax is treated as paid if arrangements satisfactory to the Tax Authority are made for payment of the tax.”
9. As a matter of concession, where payment is to be made by BACS or CHAPS, Revenue Scotland accept that payment will be treated as being made timeously if it is made within five working days of the due date. For that reason, in the Declaration part of the return the “Latest payment date for arrangements satisfactory” is stated to be “26/09/2018”.
10. On 11 September 2018, the Appellant put the agent in funds to make payment of the LBTT but no payment was made either on the due date or within seven days thereof.
11. On or around 26 September 2018 the Appellant was notified by the agent that the application for registration of one of the properties had been accepted by The Keeper of the Registers of Scotland (“the Keeper”) on 24 September 2018.

12. Revenue Scotland sent the agent an email reminder on Friday 18 January 2019 at 10:47 pointing out that the LBTT of £6,364 had not been paid. (It was not a Saturday as argued by the agent in the Notice of Appeal.)

13. Payment of the £6,364 of LBTT was received electronically from the agent by Revenue Scotland on Tuesday 22 January 2019.

14. The Penalty Assessment Notice was issued by Revenue Scotland to the Appellant on 26 March 2019 in a total sum of £378 including £60 relating to interest on the unpaid tax. That interest was paid on 10 April 2019. The penalty has not been paid.

Legislation

15. As indicated at paragraph 8 above, Section 40 LBTTA provides that LBTT must be paid when the return is lodged or by the arrangement satisfactory date.

16. Section 168 RSTPA provides that a penalty is payable where a person fails to pay LBTT on or before the date falling 30 days after the date by which the amount due in terms of Section 40 LBTTA must be paid.

17. Section 169 RSTPA provides that the penalty is 5% of the unpaid tax. In this case, 5% of the unpaid tax of £6,364 amounts to £318.

18. Section 177 RSTPA provides that “Revenue Scotland may reduce the penalty ... if it thinks it right to do so because of special circumstances”. There is no definition of special circumstances and the examples of what do not constitute special circumstances are not relevant in this appeal. 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.”

19. 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. There is no definition of reasonable excuse, but Section 178(3) specifies that where a taxpayer relies on a third party to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

20. Section 43 LBTTA provides that the Keeper may not accept an application for registration of a document effecting or evidencing a notifiable transaction unless any tax payable in respect of the transaction has been paid. Like Section 40, Section 43(4) goes on to provide that that tax is treated as paid if arrangements satisfactory to Revenue Scotland are made for the payment of the tax.

The Appellant’s arguments

21. The Appellant’s agent conceded that the payment of the LBTT was late, but argued that:

- a. The Appellant should not be subject to the penalty, as the late payment of the LBTT was due to an internal error by its solicitors, not by it. The Appellant had put its solicitors in funds to pay the tax timeously. Further, it was entitled to have concluded that the tax was paid, as the Keeper had accepted at least one of the applications for registration. It should, therefore, not be held liable for the oversight of the agent
- b. The Appellant was not responsible for the delay in payment and was entitled to believe that there had been full compliance. It is contrary to human rights to fine a party who is blameless.
- c. The amount of the penalty, at 5% of the LBTT, is wholly disproportionate in this case.
- d. It is unfair that Revenue Scotland has not exercised its discretion to reduce or waive the penalty, particularly against a background in which HMRC often does so.
- e. The same author issued letters on 8 May and 20 June 2019 and therefore there was a lack of objectivity on the part of Revenue Scotland.
- f. Revenue Scotland are at fault in not having a system to send reminders more quickly.

Revenue Scotland's arguments

- 22. The tax was paid late and the penalty properly imposed in terms of the legislation.
- 23. The Appellant has failed to establish grounds to warrant the variation or cancellation of the penalty.
- 24. Specifically, the Grounds of Appeal do not disclose a sufficient basis to justify a reduction of the penalty for special circumstances or that the penalty should be waived as a result of a reasonable excuse for the failure.
- 25. The penalty, at 5% is not disproportionate and Revenue Scotland is bound to apply the law subject only to the statutory powers of mitigation. Beyond that it has no discretion.

Discussion

Was the penalty correctly imposed?

- 26. 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*¹ ("Perrin") made clear at paragraph 69:

"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

¹ [2018] UKUT 156 (TC)

a balance of probabilities, the penalty must be cancelled without any question of 'reasonable excuse' becoming relevant."

27. Revenue Scotland has furnished the relevant evidence. There is no doubt that the LBTT was paid late and that the penalty has been correctly calculated in terms of the legislation. Revenue Scotland have therefore discharged their burden of proof.

28. The penalty regime in RSTPA and the Tribunal's jurisdiction was discussed at some length in *Straid v Revenue Scotland*² ("Straid"). We adopt that reasoning.

29. The burden of proof now rests with 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.

Reasonable Excuse

30. It is not disputed that the reason for the failure to pay the LBBT was due to an internal administrative oversight on the part of the agent. Can that amount to a reasonable excuse for the Appellant?

31. The Tribunal in *Straid* sets out the law on reasonable excuse at paragraphs 42 to 46 which we annex at Appendix 2.

32. Although Revenue Scotland refer to a number of cases, the case which is in point, and with which we agree, is *Begbies Traynor (Central) LLP v Revenue Scotland*³ ("Begbies"). We adopt the reasoning of the Tribunal at paragraphs 56-59 which read:

"56. In terms of Section 178 of RSTPA a taxpayer may be spared a penalty if the taxpayer has an excuse, but the excuse must be a reasonable one. Reasonable excuse is not defined in RSTPA. We set out in paragraphs 45 and 46 in *Straid* the relevant test which is an objective test applied to the individual facts and circumstances of the appellant.

57. The reason for the failure to make the return was an oversight by one of the appellant's agent's personnel. That was a mistake, and unfortunately not an unusual one. The question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garmoss Limited t/a Parham Builders v HMRC*⁴ where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

'What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. ...'

58. A simple administrative oversight is a mistake but in the absence of any other information does not amount to a reasonable excuse. However, it is the appellant who is liable for the penalty and the potential reasonable excuse...is that reliance was placed on the agent."

Reliance on a third party as a reasonable excuse

59. Judge Bishopp in *Ryan v HMRC*⁵, which was a case about a penalty for late submission of a Stamp Duty return and so is very relevant here, stated:

² [2017] FTSTC 2

³ [2019] FTSTC 4

⁴ [2012] UKFTT 315 (TC)

⁵ [2012] UKUT 9 (TCC)

'On the other hand I have to agree with Mr Ryan that if he was represented in the transaction by a solicitor, he should be entitled to expect the solicitor not merely to advise him of his obligation to submit a return but to perform the obligation for him. But that is not the same as saying that he has a reasonable excuse, within the meaning of the legislation. The plain purpose of the legislation is to encourage the prompt submission of returns by imposing penalties on those who submit them late. The penalty is imposed on the person concerned, and not upon his solicitor or any other representative. The purpose of the legislation would be defeated if a penalty could be escaped by the expedient of placing the blame on a dilatory solicitor. If Mr Ryan believes he has been let down by his solicitor, his remedy is to take the matter up with the solicitor.'

33. We agree.

34. Since the decision in *Begbies* was issued, the Upper Tribunal in *HMRC v Katib*⁶ ("Katib") has considered the question of reliance on an agent. At paragraph 54 the Tribunal stated:

"54... In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:

Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other."

35. In itself the failure by the agent cannot be a reasonable excuse for the Appellant.

36. Section 178(3)(b) of RSTPA provides that where a taxpayer relied on any other person to make the payment it is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. The agent argued that the Appellant had taken reasonable care in that it had put the agent in funds to pay the LBTT and the application for registration had been accepted by the Keeper. Therefore it was reasonable for the Appellant to assume that the LBTT had been paid.

37. As can be seen from *Begbies* and *Katib*, putting the agent in funds did not entitle the Appellant to conclude that payment of the LBTT had in fact been made and, of course, it did not ensure that payment of the LBTT was made on time. Providing the funds to the agent was nothing more than a step in the process to enable payment of the LBTT to be made.

38. Does the acceptance by the Keeper of the application for registration amount to a reasonable excuse? The agent does not refer to Section 43(1)(b) LBTTA which provides that the Keeper may not accept an application for registration of a document effecting or evidencing a notifiable transaction unless any tax payable in respect of the transaction has been paid.

39. The agent simply states that the Appellants (sic) were notified that the Keeper had accepted an application for registration of a document effecting or evidencing a notifiable

⁶ [2019] UKUT 0189 (TCC) paragraphs 54 and 55

transaction on 24 September 2018 and the registration for one of the properties was issued on 26 September 2018. The inference was that the Appellant was entitled to conclude from this that the tax had, in fact, been paid.

40. Section 43 must be read as a whole. Subsection (4) provides that for the purposes of subsection (1)(b), tax is treated as paid if arrangements satisfactory to the Tax Authority are made for payment of the tax. Clearly, the Keeper may accept an application if the tax has in fact been paid or if arrangements satisfactory to Revenue Scotland are made for payment of the tax.

41. In choosing to pay by BACS or CHAPS the agent entered into an arrangement that was satisfactory to Revenue Scotland. Unfortunately the agent failed to comply with that.

42. The Keeper registered the title on 24 September 2018 which was two days before the extended due date for payment in terms of that arrangement. All that can be inferred from that is that it was reasonably expected that the agent would honour the obligation and the tax would be paid timeously

43. Even if the Appellant had been aware of the provisions of Section 43, which seems highly improbable, the Appellant could conclude from the Keeper's acceptance on 24 September 2018 no more than that either the tax had in fact been paid, or there was a satisfactory arrangement in place for it to be paid. On that date there was a satisfactory arrangement in place, as the LBTT return makes clear.

44. Neither the agent nor the Appellant was entitled to conclude from the acceptance of the application by the Keeper on 24 September 2018 that the LBTT had been paid.

45. For all these reasons, we find that the Appellant has not established that there was a reasonable excuse for the late payment of the LBTT.

Special circumstances

46. The Tribunal in *Straid* sets out the law on special circumstances at paragraphs 58 to 65 which we annex at Appendix 2. We adopt that reasoning.

47. Unfortunately, administrative oversight, whether by the Appellant or the agent, is neither unusual nor uncommon.

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

Fairness and proportionality

49. Essentially it is argued that the penalty is unfair. Revenue Scotland relied on the decision of the Tribunal in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*⁷ where at paragraph 67, having reviewed the decision of the Upper Tribunal in *HMRC v Hok*⁸ it was held that “The Tribunal does not have jurisdiction to consider either fairness or Revenue Scotland’s conduct.” It does not. We agree.

50. Therefore the argument that the author of two letters was the same person and there was a lack of objectivity is irrelevant. However, we point out that that author had conducted the review, was independent of the decision maker and the second letter was simply in response to a further letter from the agent. There was no reason why he should not have replied.

51. Revenue Scotland’s reminder system is a matter entirely for them.

52. Similarly, whether Revenue Scotland chooses to impose a penalty, or not, is not a matter for this Tribunal.

53. Our jurisdiction extends only to ascertaining the facts and then deciding whether the law has been correctly applied. In this instance it has.

54. In that context the alleged actions of HMRC are also entirely irrelevant.

55. The Tribunal in *Straid* sets out the law on proportionality at paragraphs 91 to 100 which we annex at Appendix 2. We adopt that reasoning.

56. Further, as Revenue Scotland correctly argue, the power to mitigate the penalty if there is a reasonable excuse or special circumstances, as was discussed in *HMRC v Total Technology*⁹ (which in turn was discussed in *Straid*) means that the penalty regime is proportionate both in the round and at an individual level.

57. In any event, we do not accept the argument that the default in this instance is minor. We refer the Appellant to paragraph 96 of the decision of the Upper Tribunal in *Romasave (Property Services) LTD v HMRC*¹⁰ which reads:

“Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days...a delay of more than three months cannot be described as anything but serious and significant.”

58. The payment of LBTT was made 95 days late in the context of a time limit for lodgement of the return (and therefore payment of the tax) of 30 days¹¹ beginning with the effective date of the transaction. The delay is therefore significant.

⁷ [2018] FTSTC 3

⁸ [2012] UKUT 363 (TCC)

⁹ [2012] UKUT 418 (TCC)

¹⁰ [2015] UKUT 254 (TCC)

¹¹ Section 29(3) LBTTA

Conclusion

59. We accept Revenue Scotland's view of the matter. We dismiss the appeal and confirm the penalty of £318.

60. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT

President

RELEASE DATE: 18 December 2019

RSTPA

168.— Penalty for failure to pay tax

(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.

	Tax to which payment relates	Amount of tax payable	Date after which penalty incurred
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>
2.	Scottish landfill tax	<p>(a) Amount payable under regulations made under section 25 of the LT(S) Act 2014.</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</p>	<p>(a), (b), (c), (e) and (g) The date by which the amount must be paid.</p> <p>(d) and (f) The date falling 30 days after the date by which the amount must be paid.</p>

		<p>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>	
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(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.

(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.

169.— Land and buildings transaction tax: amounts of penalties for failure to pay tax

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

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

(3) 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.

(4) 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.

177 Special reduction in penalty under Chapter 2

(1) Revenue Scotland may reduce a penalty under this Chapter if it thinks it right to do so because of special circumstances.

(2) In subsection (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

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

(a) remitting a penalty entirely,

(b) suspending a penalty, and

(c) agreeing a compromise in relation to proceedings for a penalty.

(4) In this section references to a penalty include references to any interest in relation to the penalty.

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

178 Reasonable excuse for failure to make return or pay tax

- (1) If P satisfies Revenue Scotland or (on appeal) the tribunal that there is a reasonable excuse for a failure to make a return, liability to a penalty under sections 159 to 167 does not arise in relation to that failure.
- (2) If P satisfies Revenue Scotland or (on appeal) the tribunal that there is a reasonable excuse for a failure to make a payment, liability to a penalty under sections 168 to 173 does not arise in relation to that failure.
- (3) For the purposes of subsections (1) and (2)—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control.
 - (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
 - (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

LBT TA

40 — Payment of tax

- (1) Tax payable in respect of a land transaction must be paid to the Tax Authority.
- (2) Where a return is to be made under any of the following provisions, the tax or additional tax payable must be paid at the same time as the return is made—
- (a) section 29 (land transaction return),
 - (b) section 31 (return where contingency ceases or consideration ascertained),
 - (c) section 33 (further return where relief withdrawn),
 - (d) section 34 (return or further return in consequence of later linked transaction), or
 - (e) in schedule 19 (leases)—
 - (i) paragraph 10 (return on 3-yearly review),
 - (ii) paragraph 11 (return on assignation or termination of lease),
 - (iii) paragraph 20 (return where lease for fixed term continues after end of term),
 - (iv) paragraph 22 (return in relation to lease for indefinite term),
 - (v) paragraph 30 (transactions which become notifiable on variation of rent or term).
- (3) Tax payable as a result of the amendment of a return must be paid at the same time as the amendment is made.
- (4) For the purposes of subsections (2) and (3), tax is treated as paid if arrangements satisfactory to the Tax Authority are made for payment of the tax.
- (5) This section is subject to section 41 (application to defer payment of tax in case of contingent or uncertain consideration).

43 Return to be made and tax paid before application for registration

(1) The Keeper of the Registers of Scotland (“the Keeper”) may not accept an application for registration of a document effecting or evidencing a notifiable transaction unless—

- (a) a land transaction return has been made in relation to the transaction, and
- (b) any tax payable in respect of the transaction has been paid.

(2) The Tax Authority must provide the Keeper with such information as the Keeper reasonably requires to comply with subsection (1).

(3) In this section, “registration” means registration or recording in any register under the management and control of the Keeper.

(4) For the purposes of subsection (1)(b), tax is treated as paid if arrangements satisfactory to the Tax Authority are made for the payment of the tax.

(5) This section is subject to section 41 (application to defer payment of tax in case of contingent or uncertain consideration).

Straid Farms Ltd v Revenue Scotland

Reasonable excuse

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.

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*¹² makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically.

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.

45. Lord Rodger of Earlsferry at paragraph 81 in *R v G*¹³ says:

“... 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”.

46. The test articulated by Judge Medd in *The Clean Car Company Limited v CEE*¹⁴ has recently been approved in the context of Social Security legislation by Judge Rowland in *VT v SSWP*¹⁵. Judge Medd said:-

“...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”.

¹² 2016 UKSC 13

¹³ 2009 UK HL 13

¹⁴ 1991 VTTR 234

¹⁵ 2016 UKUT 178 (AAC)

Special circumstances

58. Having found that there is no reasonable excuse, and that therefore the decision 20 that the penalty is payable is affirmed, as Judge Berner indicated in *Collis v Revenue & Customs Commrs*⁸ (“Collis”), the Tribunal “...should normally go on to consider the amount of that penalty, including any decision regarding the existence or effect of any special circumstance ...”.

59. Like reasonable excuse, special circumstances is not defined in RSTPA but the concept is to be found in the general tax law in the United Kingdom and in other statutory 25 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 30 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)*¹⁶ 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

¹⁶ 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*¹⁷ 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..." or in this case late payment.

Proportionality

91. This is an area where there is extensive jurisprudence.

92. The Upper Tribunal in *HMRC v Total Technology*¹⁸ ("Total") stated at paragraph 74:

"[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."

93. The Tribunal went on to say at paragraph 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 ...".

94. We are not concerned here with the penalty scheme as a whole but rather confine ourselves to looking at the penalty at an individual level.

95. The starting point for that is Article 1 to the First Protocol ("A1P1") to the European Convention for the Protection of Human Rights and Fundamental Freedoms. That reads:

"Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

96. The appellant is a "legal person". 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. At paragraph 20 it is reported that in considering proportionality, Revenue Scotland relied on the four stage criteria expounded by Lord Sumption at [20] in *Bank Mellat v HM Treasury*¹⁹ ("Mellat") and that reads:

¹⁷ 2012 UKFTT 364 (TC)

¹⁸ 2012 UKUT 418 (TCC)

¹⁹2013UKSC 39

“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 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.

97. 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*²⁰ (“Roth”) where he sets out the test for assessing proportionality at paragraph 26 as follows:

“...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?”

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.

98. What would be so plainly unfair? The Court in *James and Others v United Kingdom*²¹ (“James”) at para 50 said that the “fair balance” that was required would protect individuals from having to bear “an individual and excessive burden”.

99. 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.

100. We know and accept that the Scottish Parliament, like every other legislature considering A1P1 enjoys a wide margin of appreciation and *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.

²⁰ [2003] QB 728

²¹ 1986 8 EHRR 123