

Tax Chamber
First-tier Tribunal for Scotland



[2024] FTSTC 12

Ref: FTS/TC/AP/24/0021

Land and Buildings Transaction Tax – Sections 159, 160 and 161 of Revenue Scotland and Tax Powers Act 2014 – Procedural irregularity? – the Revenue Scotland and Tax Powers Act 2014 (Amendment) Regulations 2020 – reasonable excuse or special circumstances for failure to make a return

DECISION NOTICE

IN THE CASE OF

BOBS MECHANICAL REPAIRS

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: PAUL DOYLE
KATRINA LUMSDAINE**

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 29 August 2024 and Revenue Scotland's Statement of Case, and attachments, dated 21 October 2024, and the appellant's response thereto dated 3 December 2024.

DECISION

1. The Appellant is Robert McMahon, who trades as Bob's Mechanical Repairs from a garage on Perth Road, Birnam, Dunkeld, PH8 0DN. ("the Property").
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 letters dated 20 October 2023 and 2 April 2024.
4. Both parties ask us to decide this appeal on the documentary evidence only.
5. The appeal was lodged late. The Respondent's Review Conclusion letter was dated 20 June 2024. The appeal was lodged on 29 August 2024. It ought to have been lodged within 30 days of the date of the Review Conclusion letter. The Appellant explained difficulties in completing the appeal formalities. The Respondent confirmed in writing on 9 September 2024 that it had no objection to the appeal proceeding, although late. We therefore consented to the appeal proceeding.

Findings in Fact

6. The Appellant is a sole trader who uses the business name "Bob's Mechanical Repairs".
7. On 31 July 2017, the Appellant entered into a 15-year lease for the Property. The Appellant's agent submitted a LBTT return on 11 September 2017. No tax was due on the transaction.
8. The LBTT return submitted on 11 September 2017 was 12 days late. It had been due not later than 30 August 2017. On 19 September 2017 the Respondent issued a £100 penalty notice to the Appellant. The Appellant paid the penalty notice on 23 April 2018.
9. Paragraph 10(1)(a) of Schedule 19 of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") applies to the lease.
10. Under paragraph 10 of LBTTA, the Appellant must make a further return to the Respondent if, on a review date, the lease has not been assigned or terminated. The lease review return must be submitted 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.
11. The effective date of the original lease transaction for the Property was 31 July 2017. The

Appellant's first lease review date was 31 July 2020, and the first three year lease review return was due by 30 August 2020.

12. On 16 July 2020, the Respondent issued a three year lease review return reminder letter to the Appellant. The letter told the Appellant that a three year lease review return was due in relation to the Property not later than 30 August 2020. 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 (i.e. up to a maximum of £900).

13. The Appellant has still not submitted his first three year lease review return. (The Respondent suspended all penalties during the Covid-19 pandemic. The suspension decision covered the period from 23 March to 30 November 2020).

14. The Appellant's second three year lease review return was due by 30 August 2023. On 7 July 2023, the Respondent issued a second lease reminder letter to the Appellant. The letter said that a tax return was due in relation to the Property by 30 August 2023. The letter also contained the same information as the first lease review reminder (narrated in paragraph 11 above).

15. On 20 October 2023, 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.

16. On 2 April 2024, the Respondent issued a second Penalty Assessment Notice to the Appellant. The notice contained a second penalty ("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.

17. On 10 April 2024, the Respondent received a telephone call from a third party acting for the Appellant, who reported difficulties submitting the three year lease review return. The Respondent provided assistance for submitting this online, and the Appellant's three year lease return was submitted on the same day.

18. On 10 April 2024, the Appellant contacted the Respondent via email to ask for a review of the decision to issue the two penalty notices on the following grounds:

- (i) The recent penalty notice was sent to the Address used on the first LBTT return, which was no longer the Appellant's address. The Appellant said that the recent penalty notice had been handed to him in the last few days.

(ii) The Appellant was not aware of the requirement to submit a lease review return prior to receipt of the penalty notice and believes his landlord's solicitor may have filed the original LBTT return.

19. On 20 June 2024, the Respondent issued its Review Conclusion letter to the Appellant, which adhered to the decision to issue penalty notices.

20. On 30 August 2024, the Appellant appealed the Penalty Assessment Notices dated 20 October 2023 and 2 April 2024.

The area of dispute

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

“Since taking tenancy of the premises in 2017, I was never made aware by anyone regarding Revenue Scotland LBTT and I had never completed a 3 yearly review

Due to reminders being sent to an address that I had not lived in since 2018, I still had no knowledge of my responsibilities in this matter.

I should not be penalised for something I knew nothing about or penalised for not advising my new address when in fact I didn't know Revenue Scotland and LBTT even exists.

The penalty fine of £1,000.00 should be withdrawn and the fact that I submitted a review immediately that I knew it existed should be taken into account.”

22. The Respondent says that the Appellant cannot establish a reasonable excuse for failure to make a three year lease review 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

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

Analysis

24. There is little dispute about the facts of the case. The Appellant says there has been procedural irregularity. The Appellant says that he has been treated unfairly and if the Respondent had issued a correctly addressed reminder he would have made the three year lease review

return on time. The Appellant says the fine is disproportionate.

25. The Appellant has still not submitted his first three-year lease review return. On 23 April 2018 the Appellant paid a penalty of £100 because his original LBTT return was 12 days late.

26. The second three year lease review return was due on 30 August 2023. It was received on 10 April 2024. The second three year lease review return was submitted over seven months late. Both sections 159 and 160 apply.

27. The Appellant's appeal proceeds almost entirely on an argument that the Respondent has a duty to send him a reminder before a three year 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 year lease review return.

28. Section 161 RSTPA provides that if a failure to make a three year lease review 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).

29. 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.

30. 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.

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

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

Reasonable Excuse

32. 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.

33. The Appellant says lack of communication from the Respondent led to the penalty notices

because the Appellant only became aware of the late filing in April 2024, after receipt of the Penalty Assessment Notice. The Appellant says that if he had been contacted, the return would have been completed and submitted on time. The Appellant says that he did not know a return was due, and did not even know of the Respondent's existence.

34. The Respondent sent two reminder letters, but they were both sent to the Appellant's old address. The Appellant did not receive the reminders. It is hard to understand the Appellant's argument that he knew nothing of the Respondent's existence because the Appellant paid a penalty directly to the Respondent in April 2018. At best, the Appellant had simply forgotten about the Respondent.

35. The Tribunal has looked at the penalty regime in a number of cases. In particular, the penalty regime for three year lease review returns was considered in detail in *Ying Chun Kot v Revenue Scotland 2019 FTSTC 1* ("Kot").

36. In paragraph 41 the Tribunal in Kot held that "*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.*"

37. Although not binding upon us, we agree. LBTT is a self-assessed tax. The Respondent is not required to notify a taxpayer of their responsibility to submit a three year lease review return. Therefore, the Appellant does not have a reasonable excuse simply due to the Respondent's failure to send a reminder letter to the correct address or the Appellant's forgetfulness.

38. 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 a lack of knowledge.

39. The Appellant had advice when he originally took a 15 year lease of the property. It is no surprise that the Appellant is unaware of the law and the statutory provisions, but the Appellant paid a penalty notice in April 2018. His contact with the Respondent in 2017/2018 and his involvement with the penalty regime indicate that the Appellant must have known that the Respondent exists and that the Respondent issues penalty notices for late returns.

40. The Appellant does not establish reasonable excuse.

Special circumstances

41. Section 177 RSPTA permits the Respondent to reduce a penalty if it thinks it is right to do so

because of special circumstances.

42. The Appellant says that the penalty notices came as a shock because he did not know a three year lease review return was due, that he acted promptly in April 2024, and that he is treated unfairly. The appellant says that even though he submitted his three year lease review return late, he submitted it as soon as he received the second penalty notice. 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 penalty.

43. Like reasonable excuse, special circumstances is not defined in RSTPA, but guidance is found in case-law.

44. 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’”.

45. 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”.

46. 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”.

47. None of the circumstances set out by the Appellant are either unusual or uncommon.

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

49. 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.”

50. 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 ...”.

51. 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.

52. In circumstances in which the Appellant submitted a three year lease review return for the Property over seven months late, we do not find the individual penalty to be disproportionate when judged against the objective of the relevant legislative provisions to ensure timeous returns.

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

54. 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.

55. 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.”

56. In *HMRC v Hok* [2012] UKUT 363 (TCC) (“Hok”) 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."

57. 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."

58. 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 return on time. On the facts as we find them to be, the Appellant cannot establish special circumstances which would merit a reduction in penalty.

59. The penalty notices are not disproportionate. There are no harsh or unjustifiable consequences flowing from the penalty notices. We do not have jurisdiction to consider whether the Appellant has been treated unfairly.

Decision

60. The appeal is dismissed

61. The Respondent's penalties (under sections 159, 160 and 161 RSTPA) issued in Assessment Notices to the Appellant on 20 October 2023 and 2 April 2024 are confirmed.

Right of Appeal

62. 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: 20 December 2024