

**Tax Chamber**  
**First-tier Tribunal for Scotland**

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[2019] FTSTC 6

Ref: FTS/TC/AP/19/0005

***Land and Buildings Transaction Tax (LBTT) – penalty for late payment - section 29 LBTTA; section 40(2) LBTTA - whether reasonable excuse - no - whether special circumstances - no - limits to jurisdiction - appeal dismissed.***

**DECISION NOTICE**

IN THE CASE OF

**Ms Ruth Anne Munro**

Appellant

- and -

**Revenue Scotland**

Respondent

**TRIBUNAL: KENNETH CAMPBELL, Legal Member**  
**CHARLOTTE BARBOUR, Ordinary Member**

**The Tribunal determined the appeal on 7 August 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 18 February 2019, Revenue Scotland's Statement of Case, with attachments acknowledged by the Tribunal on 5 April 2019.**

## DECISION

### Introduction

1. This is an appeal against a penalty notice issued by Revenue Scotland to the appellant under Sections 168 and 169 of the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”). The penalty was issued because the appellant had not paid Land and Buildings Transaction Tax (“LBTT”) by the due date for payment.
2. There is no dispute between the parties with respect to:
  - (a) the factual background to the case;
  - (b) the relevant legislative provisions; and
  - (c) the sum calculated by way of penalty.
3. We therefore summarise only the directly relevant facts and legislative provisions.

### Factual background

4. The appellant entered into a transaction for the purchase of a residential property in Helensburgh. The appellant’s agent submitted an electronic tax return in relation to the purchase transaction on 13 August 2018. The effective date of the transaction was stated to be 10 August 2018. The LBTT due on the transaction was not paid by the appellant’s agent at the same time as the tax return was submitted. The payment of LBTT was made on 17 September 2018.
5. On 3 December 2018, the respondent issued a penalty notice to the appellant in the total sum of £803 (including £11 relating to interest) under Sections 168 and 169(2) of RSTPA. On 6 December 2018, the appellant’s solicitor responded to the penalty notice. The response was treated by the respondent as a request for a review of the decision to apply the penalty.
6. On 12 December 2018, the respondent wrote to the appellant acknowledging the request for review and seeking any further information to be submitted by 28 December 2018. The appellant’s solicitor wrote to the respondent on 17 December 2018 stating that he had nothing further to add. On 4 February 2019, the respondent wrote to the appellant with the conclusion of the statutory review. The original decision to apply the penalty was upheld, the reasons given for that, and in addition the respondent also provided a response to additional points raised in correspondence by the appellant’s solicitor.
7. A Notice of Appeal was submitted by the appellant to the Tribunal dated 18 February 2019. On 26 February 2019, the appellant’s solicitor wrote to the respondent requesting postponement of penalties and interest. On 5 March 2019, the respondent wrote to the appellant requesting information in support of that application for postponement of payment in terms of Section 245(2) of RSTPA and the Revenue Scotland and Tax Powers Act (Postponement of Tax Pending a Review or Appeal) Regulations 2015 (SSI 2015/129). On 12 March 2019, the appellant’s solicitor wrote to the respondent stating that the appellant would make a payment under reservation of all rights.

## Legislation

8. We annex at Appendix 1, Sections 29 and 40 of the Land and Buildings Transaction Tax Act 2013 (“LBTTA”). We would highlight in particular, Section 40(2) which reads:

“**40(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)”.

9. We also set out in Appendix 2, Sections 168 and 169 of RSTPA.

10. 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. We have set out the full text of Section 178 in Appendix 2.

11. Section 177(1) 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 in Appendix 2. It can be seen that there is no definition of special circumstances and the examples set out there of what do not constitute special circumstances are not relevant in this appeal.

## The appellant’s submissions

12. The appellant states the following in her Notice of Appeal:

“Revenue Scotland accept in their review of 4 February 2019 that the LBTT return was not due until 30 days after the effective date and that if the Return had been submitted on 9 September penalties would not have been incurred until 9 October.

Revenue Scotland accept that had the Return been submitted on 9 September rather than 13 August then no penalties would have been incurred.

Revenue Scotland’s interpretation of the statutory provisions leads to unfair and unreasonable outcome whereby penalty charges are sought of £803 whereas the actual tax could have been paid 23 days later with no penalties being incurred had the return not been submitted until 9 September 2018. This cannot be the intention of the legislation.”

## The respondent’s submissions

13. Revenue Scotland submit that Section 40 of LBTTA is unambiguous in requiring payment of tax at the same time as the return is made. They also point out that the electronic return for the appellant’s transaction made clear the latest payment date as 20 August 2018 because the appellant’s solicitor had selected BACS/CHAPS as the payment method. The respondent submits this is in accordance with its published guidance.

14. The respondent submits that there is nothing in the appellant's Grounds of Appeal which discloses a reasonable excuse for failing to pay timeously, nor are there special circumstances in terms of Section 177 RSTPA. Insofar as the appellant's Grounds of Appeal relate to fairness and the intention of the legislation, the respondent submits that consideration of such matters is not within the jurisdiction of this Tribunal.

## **Discussion**

### *Timing of payment*

15. As will be apparent, the central issue is the timing of payment of LBTT in relation to the date of submission of the return required in terms of Section 29 LBTTA. In our view the obligation is clear, and is set out in Section 40(2) of LBTTA. That provides in clear and unambiguous terms that "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". That applies where, as in this case, a return is made under Section 29 LBTTA. Since the return was submitted on 13 August 2018, it follows that the tax was due to be paid on 13 August 2018, or at the latest 20 August 2018 in accordance with Revenue Scotland's guidelines about payment by electronic means. The tax was not in fact paid until 17 September 2018.

16. The appellant's agent makes the point that it would have been possible to submit the return timeously up to and including 9 September 2018, in which event penalties would not have been incurred until 9 October 2018. That is neither here nor there. The fact that the return may be made at any point within a defined window has no bearing on the requirements of Section 40, which are to pay the tax at the time the return is made.

### *Reasonable excuse*

17. In terms of Section 178 RSTPA, a taxpayer may be spared penalty if the taxpayer has an excuse, but the excuse must be a reasonable one. The phrase "reasonable excuse" is not defined in RSTPA. However, the Tribunal examined the case law in some detail in the case of *Straid Farms Limited v Revenue Scotland* [2017] FTSTC 2. The Tribunal there, under reference to consideration by Lord Roger of Earlsferry in the House of Lords case of *R v G* noted that "Whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case" (see paragraph 45). The Tribunal also held, under reference to earlier case law, that the test of whether there is a reasonable excuse is an objective one (see paragraph 46).

18. While not entirely free from doubt, the appellant's Grounds of Appeal appear to suggest that the tax was paid late due to ignorance or misunderstanding of the nature of the obligation imposed by law. The Tribunal has considered the question of ignorance of the law in the decision in *Kot v Revenue Scotland* [2019] FTSTC 1, where the Tribunal held "...in certain circumstances ignorance of the law can amount to a reasonable excuse" (see paragraph 38).

19. However, the appellant makes no submission about her knowledge of her obligations in relation to LBTT. Further, in the circumstances where the return was made in connection with the residential property purchase, it is likely the appellant relied on her

solicitor to submit the tax return and pay the tax due. In those circumstances, it is not objectively reasonable for the appellant, where she has a solicitor acting on her behalf, to have been ignorant of the requirement to pay the tax at the same time as the return was submitted. Section 40(2) of LBTTA is clear and unambiguous in that respect. In addition, the guidance published by the respondent on its website is clear and unambiguous on this point.

20. Separately, and in any event, Section 178(3)(b) of RSTPA provides that where the person due to pay the penalty relies on any other person to do anything, that is not a reasonable excuse unless the person due to pay the penalty took reasonable care to avoid the failure. There is nothing in the material before us to suggest that that is the case here.

21. Accordingly, there is nothing which amounts to a reasonable excuse in this case.

### *Special circumstances*

22. We turn to consider whether there are special circumstances in terms of Section 177 RSTPA. There is, however, no statutory definition of what amounts to special circumstances, other than provision in Section 177(2) of matters which will not constitute special circumstances. These are “(a) ability to pay, or (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another”. Neither of these applies in the present case.

23. The Tribunal in the *Straid Farm* decision already referred to, considered the nature of special circumstances, and agreed with Jeffrey Lane LJ *Clarks of Hove Limited v Bakers Union* that “To be special the event must be something out of the ordinary, something uncommon” (see paragraph 61). The Tribunal went on (at paragraph 64) to observe:

“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 unreasonable 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, ie where it is right that some part of the penalty should be borne by the taxpayer. Accordingly, in our view, special circumstances encompasses a situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.”

We agree.

22. The appellant’s position is that had the return been submitted at any time between 13 August 2018 and 9 September 2018, tax would have been due later and penalties would not have been incurred until a later date. While that may be correct, that is not the point. Rather, the point is the clear connection between the date of the return and the due date for payment in terms of Section 40(2) LBTTA. The appellant’s point does not, in our view, amount to a special circumstance of the kind envisaged by Jeffrey Lane LJ in *Clarks of Hove Limited*, nor by the Tribunal in *Straid Farms*.

### *Unfairness/unreasonableness*

23. The appellant’s Grounds of Appeal state that the respondent’s interpretation of the statutory provisions lead to an unfair and unreasonable outcome because the actual tax

could have been paid 23 days later with no penalties had the return not been submitted until 9 September 2018. It is asserted “This cannot be the intention of the legislation”.

24. Two points arise. First, it is trite law that the intention of the legislature is to be found in the wording used in a statute. We have already set out section 40(2) LBTTA at paragraph 8 above. It is clear in its terms. Secondly, and in any event, this Tribunal is a statutory body whose jurisdiction is confined to the powers conferred on it by statute. The Tribunal does not have jurisdiction to consider either fairness or Revenue Scotland’s conduct. The Tribunal considered its jurisdiction in this respect at some length in the case of *Goudie and Sheldon v Revenue Scotland* [2018] FTSTC 3, at paragraphs 64-72, see particularly paragraphs 67 and 72. We respectfully adopt the analysis set out there.

### **Conclusion**

25. It follows from the above that we accept the submission on behalf of Revenue Scotland. We dismiss the appeal. We confirm the penalty of £792, together with interest on unpaid tax of £11, a total of £803.

26. 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 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. The application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

**KENNETH CAMPBELL, QC**

**Legal Member**

**RELEASE DATE: 26 August 2019**

## Land and Buildings Transaction Tax Act 2013

### 29 Duty to make return

- (1) The buyer in a notifiable transaction must make a return to the Tax Authority.
- (2) If the transaction is a chargeable transaction, the return must include an assessment of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction.
- (3) The return must be made before the end of the period of 30 days beginning with the day after the effective date of the transaction.

### 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).

**Revenue Scotland and Tax Powers Act 2014**

**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.

	<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>
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</p>	<p>(a), (b), (c), (e) and (g) The amount by which the amount must be paid.</p> <p>(d) and (f) The date falling 30 days after the date by which the</p>

	<p>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>	amount must be paid.
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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.