

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 3

Ref: FTS/TC/AP/18/0009

LBTT - 3 year lease review tax return - penalty for late submission - burden of proof - reasonable excuse - Kot followed - no obligation on Revenue Scotland to remind taxpayer to file return - ignorance of the law can be an excuse but is not on facts found - whether special circumstances present - no - appeal dismissed

DECISION NOTICE

IN THE CASE OF

Miss Samreena Qamar

Appellant

- and -

Revenue Scotland

Respondent

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

The Tribunal determined the appeal on 5 February 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 10 October 2018 and Revenue Scotland's Statement of Case, with attachments.

DECISION

Introduction

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 25 September 2018.
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 19 September 2018 because the effective date of the original transaction was 20 August 2015. A return was filed by the appellant on 9 October 2018 which was 20 days late.
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

4. On 29 September 2015, the appellant’s agent submitted an electronic LBTT return (reference RS0579871) in relation to Plots 255, 256 and 257, Park First Glasgow, Car Park 3, Murray Street, Glasgow. On 22 January 2016, the appellant’s agent submitted an amended electronic LBTT return. The purpose of this appears to have been to change the name of the “seller” from “Miss Samreena Qamar” to “First Group Global Limited”, presumably to correct a clerical error in the original Return, wherein the appellant is listed as both seller and buyer.
5. Revenue Scotland has a record of issuing a reminder to the appellant before the 3-year LBTT Return was due for submission. It does not have a copy of the letter on file. There was no response. In the absence of submission of that return, on 25 September 2018, the penalty notice was issued to the appellant at the same address to which the reminder had been sent.
6. The appellant did not seek a review of the decision to impose the penalty but appealed directly to the Tribunal on 9 October 2018. She has not paid the penalty nor the interest arising thereon.
7. There is no dispute that the effective date for the original transaction was 20 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 19 September 2018. The LBTT 3-year Return was not filed until 9 October 2018.

The Law

8. 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—...

(1) This paragraph applies where, in relation to a chargeable transaction to which this schedule applies-

(a) the buyer made a land transaction return ...

(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).

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

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

(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...”.

9. The penalty arises in consequence of sections 159 and 160 RSTPA which read:

“159 Penalty for failure to make returns

(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.

(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.

(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.

(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

(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.”

10. RSTPA contains provisions mitigating penalties in certain circumstances. Thus 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 in Appendix 1, but 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.”

11. 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 1.

12. 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

13. The appellant does not dispute that the return was late. She argues that:

- (a) She did not know the 3-year LBTT Return was due because she did not receive a reminder from Revenue Scotland.
- (b) She lives in Australia and was not aware of the requirement to file a 3-year LBTT Return.

Revenue Scotland’s submissions

14. Reading their Statement of Case shortly, 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 (see paragraph 27 of the Statement of Case).

Discussion

15. Since the Notice of Appeal in this case was lodged, the Tribunal has recently considered the penalty regime relating to 3-year LBTT Returns in its decision in *Kot v Revenue Scotland*¹. We agree with the analysis in that decision, and adopt it here.

16. From that analysis, it is clear that Revenue Scotland bears the burden of proving a penalty was properly imposed. Revenue Scotland has produced the original and amended LBTT returns from 2015 and 2016, as well as the 3-year LBTT Return filed in October 2018. It is clear from those documents that there was a lease, that the appellant made an appropriate LBTT Return in 2015, and that the 3-year LBTT Return indicates the lease has not been terminated or assigned.

¹ FTS/TC/AP/180008

17. From the Notice of Appeal it appears that the appellant accepts there was an obligation to file a return. As the Tribunal observed in *Kot* at paragraph 25 (adopting the comments of Judge Mosedale in *Welland v HMRC*):

“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.”²

18. We therefore hold that the penalty was correctly imposed, and in the correct amount.

19. 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).

20. Therefore the burden of proof now shifts 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 indicated at paragraph 12 above, there was no disclosure in this case so that cannot apply.

21. The issues in this appeal, which are linked, are:

(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.

22. In *Kot*, the Tribunal analysed a body of instructive case-law giving substance to the concepts of “reasonable excuse” and “special circumstances”. We gratefully adopt the analysis in paragraphs 30-38 of that decision here. We turn next to the application of those principles in this case.

Reasonable excuse

23. The circumstances in this case are quite 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, because the original returns bear the name of her legal advisor. It seems to us that a UK national entering into a lease or similar obligation in Australia would be expected to ensure that s(he) complied with all relevant local legislation and to take appropriate advice. So, by parity of reasoning, an overseas resident entering into an onerous obligation in Scotland might reasonably be expected to do likewise. The appellant did so in relation to the initial transaction but does not appear to have done so thereafter. In our view, that was not objectively reasonable.

² [2017] UKFTT 870 (TC), para 40.

24. In paragraph 8 above, we set out the statutory provision which requires the filing of a 3-year LBTT Return, namely the Land and Buildings Transaction Tax (Scotland) Act 2013, Schedule 19, paragraph 10. It is evident that it is a self-assessment provision, requiring active steps by the taxpayer.

25. In any event, from the documentation produced to us, there is extensive information available on Revenue Scotland's website, and had she checked the website, the appellant would have identified the requirement to file. Clearly, she did not do so.

26. The second argument put by the appellant was that Revenue Scotland had not contacted her. As we have noted, Revenue Scotland have a record of issuing a reminder. While in our view, on the balance of probability the reminder would have been received by the appellant, it matters not whether the appellant received the reminder. That is because it appears to us that Revenue Scotland is under no obligation to remind taxpayers about their obligations regarding the 3-year LBTT Return; as we have already observed, the 3-year LBTT Return is part of a self-assessment system.

27. Like the Tribunal in *Kot*, we adopt the observations of Judge Staker in *Julie Ashton v HMRC* to the following effect:

"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".³

28. In our view, it is for the appellant, as the taxpayer, to ascertain the relevant legal requirements and honour those. On the evidence before us, she did not.

29. 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. The law on what amounts to special circumstances was analysed by the Tribunal in *Straid* (at paragraphs 58 to 69) and in *Kot* (at paragraphs 45 & 46). We agree with that analysis.

31. Applying the same principles here, we find that there are no special circumstances in this appeal.

Conclusion

32. For these reasons, we prefer Revenue Scotland's view of the matter. We therefore dismiss the appeal and confirm the penalty of £100.

³ [2013] UKFTT 140 (TC), para 35.

33. 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.

KENNETH CAMPBELL QC
Legal Member

RELEASE DATE: 12 February 2019

APPENDIX 1

RSTPA

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 overpayment 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.