Tax Chamber
First-tier Tribunal for Scotland

[2019] FTSTC 5

Ref: FTS/TC/AP/17/1003

Land and Buildings Transaction Tax (LBTT) - sections 162 and 163 RSTPA - is £0 a penalty - no - section 161 RSTPA - Daily penalties - burden of proof not discharged by Revenue Scotland - has a decision been made to charge the daily penalties – no - notice issued specifying the date - no - reasonable care - no - reasonable excuse - reliance on agent - no - special circumstances - no - are penalties proportionate - yes - appeal allowed - daily penalties and £0 penalty cancelled (£100 penalty not in dispute)

DECISION NOTICE

IN THE CASE OF

MICHAEL ROBERT HARRISON and SHARON ROSS

Appellants

- and -

REVENUE SCOTLAND

Respondent

TRIBUNAL: Anne Scott, Chamber President
Charlotte Barbour, Ordinary Member

The Tribunal determined the appeal on 19 January 2018 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 attachment, dated 27 September 2017, Revenue Scotland's Statement of Case, with attachments dated 14 November 2017 and the Appellant's response thereto dated 8 January 2018.

DECISION

Introduction

1. This is an appeal against a Penalty Assessment Notice dated 11 July 2017 issued by Revenue Scotland to the appellants under Sections 159-163 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA") for failure to make a Land and Buildings Transaction Tax ("LBTT") return under Section 29 of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") timeously.

2. Section 29 LBTTA provides that:-

> "(1) The buyer in a notifiable transaction must make a return to the Tax Authority …
>
> (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."

Background

3. It is not disputed that:

(a) the appellants were the buyers in a notifiable transaction,

(b) the effective date of the transaction was 1 September 2015,

(c) the filing date for the LBTT return was 1 October 2015 (notwithstanding the fact that the first page of the Conclusion of Review letter from Revenue Scotland dated 30 August 2017 stated that it was 1 September 2017),

(d) the return was received on 3 July 2017 and was therefore 641 days late, and

(e) the initial £100 penalty for the late filing is properly imposed.

The penalties

4. We annex at Appendix 1 the legislative provisions in Sections 160 to163 RSTPA but in summary Section 160(2) provides for an initial penalty of £100 for a failure to make a LBTT return by the filing date. Section 161 provides for a "3 month penalty" where the failure continues for three months after the "penalty date". The penalty date is the day after the filing date (Section 159(4)). That penalty accrues at a rate of £10 for each day that the return remains outstanding within a period of up to 90 days. In this case therefore that penalty was £900 ("the daily penalties").

5. Revenue Scotland imposed a £0 penalty for each of the six month penalty and 12 month penalty for failure to make the return (Sections 162 and 163 respectively).

6. On 26 July 2017, the appellants requested a review of the penalties on the basis that the agents had sent the LBTT return to the appellants for signature but it was not returned to the agents and then, due to an oversight by the agents, the return was not thereafter submitted. The oversight was only discovered when the appellants indicated

to their agents that they were contemplating the sale of the premises in question. The consideration for the purchase of the property had only been £50,000 and therefore there was no Land and Buildings Transaction Tax ("LBTT") exigible.

7. On 1 August 2017, Revenue Scotland wrote to the appellants confirming that they would review the penalties and stating as follows:-

> "Revenue Scotland's view in this case is as follows: Revenue Scotland considered that a (sic) penalties are due under s159, s160 and s161 as a Land and Buildings Transaction Tax return was not received on time".

8. On 30 August 2017, Revenue Scotland upheld the penalties on the basis that the appellants had not established a reasonable excuse for the late lodgment of the return and the penalties had been appropriately levied. In the context of the £100 fixed penalty that letter referred to Revenue Scotland Guidance RSTP3006. In the following paragraph it simply stated:

> "As the return was submitted 641 days after the filing date, penalties apply under RSTPA s161(2). RSTPA s161(2) prescribes the penalty as a fixed amount of £10 for each day up to 90 days".

9. Under the heading "Conclusion" in that letter it stated that the decision was upheld since there was neither a reasonable excuse for the late filing nor were there any special circumstances.

10. The Notice of Appeal conceded the £100 penalty and argued that the penalties be restricted to that since the return was late due to an oversight and no "stamp duty" was payable. Revenue Scotland lodged a Statement of Case on 14 November 2017 and that addressed the £100 and £900 penalties only.

Discussion

11. Before we address the daily penalties which are now the subject matter of this appeal it is appropriate to deal with the £0 penalties imposed in the Penalty Assessment Notice. There is no explanation as to why the £0 penalties for the 6 and 12 month failure to make the return have been imposed.

12. As we explained at paragraph 30 in *Straid Farms Limited v Revenue Scotland*[1] *("*Straid*"):*

> "…the Explanatory Notes to RSTPA state:
>
> 'The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions'."

13. That is particularly relevant in this instance since Sections 160-163 RSTPA are phrased in precisely the same terms as paragraphs 3, 4 and 5 of Schedule 55 Finance Act 2009 ("Schedule 55"). That has been extensively litigated in the UK courts. (Section 160 replicates paragraph 3 and so on).

[1] 2017 FTSTC 2

14. We have a problem with the stated penalties of £0 for the 6 and 12 month penalties. In the Upper Tribunal decision of Mr Justice Nugee and Judge Greenbank in *R & J Birkett t/a The Orchards Residential Home and others v HMRC*[2] they stated:

> "Nor do we think that it is an answer to this point to say that a penalty could be imposed of nil. It is true that para 40(2) lays down no minimum amount for a penalty, so that a penalty of £1 per day would be permissible. But that does not we think mean that a penalty could be imposed of £0 per day. A purported decision to impose a penalty of £0 per day would in truth be a decision not to impose a penalty at all. The assessment of a penalty imposes an obligation to pay the amount assessed. But a purported assessment of a penalty of £0 would impose no obligation to pay, would not penalise the taxpayer and would in fact have no effect. That does not seem to us to be a penalty."

15. We agree. On the balance of probability, we find that the reality is that currently Revenue Scotland has made a decision that where there is no tax payable then there should be no monetary 6 or 12 month penalty imposed.

16. Although there is no reference to these penalties in the correspondence or Statement of Case, we are aware that in the *Begbies Traynor (Central) LLP* appeal, the decision in which is being issued contemporaneously with this decision, Revenue Scotland indicated that they did not consider that these penalties were "applicable" where no tax was payable. That is their prerogative but we observe that it is not the stance adopted by HMRC in relation to similar penalties (see paragraphs 44-46 below).

17. Clearly by stating the penalty at £0 they have not decided to waive the penalty in exercise of their care and management function.

18. Since this is the first FTTS case which refers to the care and management function of Revenue Scotland, it is perhaps useful to point out that paragraph 10 of the Explanatory Notes to RSTPA confirms that in relation to Section 3 RSTPA "…the reference to collection and management has the same meaning as references to care and management in older tax statutes". It goes on to refer to "The leading English case is … *Inland Revenue v National Federation of Self-Employed and Small Businesses Limited*[3]." There is in fact a later case *CIR v Nuttall*[4] where Bingham LJ referred to and echoed the thinking in the earlier case. He accepted that if in an appropriate case "…the Revenue reasonably considers that the public interest in collecting taxes will be better served by informal compromise with the taxpayer than by exercising the full rigour of its coercive powers, such compromise seems to me to fall well within the wide managerial discretion of the body to whose care and management the collection of tax is committed".

19. A decision to impose a nil penalty, albeit we say that is not a penalty *per se*, so in effect a decision not to impose penalties, in circumstances such as those in this appeal would be within that discretion.

20. These penalties should not be stated as being penalties of £0 as they have been so stated in the Penalty Notice. We therefore cancel both.

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[2] 2017 UKUT 89 (TCC)
[3] 1982 A.C. 617 or 1981 STC 260
[4] 1992 64 TC 548

Daily penalties

21. The crucial issue in regard to daily penalties is the wording of section 161 which reads as follows:-

> **161 Land and buildings transaction tax: 3 month penalty for failure to make return**
>
> (1)P is liable to a penalty under this section if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) Revenue Scotland decides that such a penalty should be payable, and
>
> (c) Revenue Scotland gives notice to P specifying the date from which the penalty is payable.
>
> (2)The penalty under this section is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under subsection (1)(c).
>
> (3)The date specified in the notice under subsection (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in subsection (1)(a).

22. As we indicate above, Schedule 55, and in particular daily penalties has been extensively litigated. The lead case is *Donaldson v HMRC*[5] *("Donaldson")*. In that case, as in this, the appellant's failure continued after the end of the period of three months beginning with the penalty date, so the condition in the first sub-paragraph was met.

Section 161(1)(b)

23. In *Donaldson* one of HMRC's arguments was that in June 2010 a high level policy decision had been taken to the effect that all taxpayers who were at least three months late in filing their returns would be liable to daily penalties. At paragraph 18, the Court found that "… a generic policy decision of the kind taken by HMRC … is a decision which satisfies the requirement of para 4(1)(b)."

24. Has Revenue Scotland made a similar policy decision? Neither the Statement of Case nor the review decision addresses that point. Indeed there is no explanation as to how or why the daily penalties were upheld beyond stating that the only discretion lies in the provisions for reasonable excuse, special circumstances and disclosure. Disclosure is not an issue in this appeal.

25. The Policy Memorandum to RSTPA was prepared by the Scottish Government and that sets out the context and intention for the penalty regime. Paragraph 105 explains that:

> "The penalties will be able to be made cumulative, for example the same non-compliant behaviour could be subject to both the fixed penalty and a daily penalty. The expectation is that the different types of penalties will form a hierarchy, with the mildest being the fixed penalties and the most serious being penalties based on a percentage of the tax calculated as being due".

[5] 2016 EWCA Civ 761

The daily penalties fall in the middle. However, there is no indication that daily penalties, or indeed any penalties, must always be imposed.

26. On the contrary, paragraph 108 reads:

> "Revenue Scotland will be permitted to use its discretion to reduce or waive some penalties in certain circumstances. Revenue Scotland will be expected to issue guidance on how this discretion will be exercised…In addition, penalties may be waived when the taxpayer has a reasonable excuse."

27. Paragraph 10 makes it explicit that the policy objective was that there would be "… three kinds of financial penalties for non-compliant behaviour – fixed penalties, daily penalties and percentage-based penalties where the penalties linked to the potential loss in tax revenue". In this case, of course, there is no loss in tax revenue.

28. More pertinently, that paragraph also states "It will also have the power to apply discretion with respect to reducing or waiving penalties in certain circumstances and must issue guidance on how discretion will be exercised." It has issued guidance.

29. That guidance reads as follows:-

> "RSTP3006 – Penalties for failing to make LBTT return on time
>
> In this page of guidance the 'penalty date' means the day after the filing date.
>
> If you fail to make a LBTT return (outlined in the table in RSTP3005) on or before the filing date (specified in column 4 of that table) then on the penalty date you become liable to a fixed penalty of £100.
>
> If your failure to make the return continues 3 months after the penalty date, we may decide that you are liable to further fixed penalties (additional to the initial fixed £100 penalty) of £10 a day for up to 90 days starting from 3 months after the penalty date.
>
> If we decide that you are liable to this penalty, we will notify you specifying the date from which the daily fixed penalty is payable. The daily fixed penalty is payable from this date until the earlier of either 90 days after this date or the date on which you submit the return. The start date we specify in the notice may be earlier than the date on which the notice is given, but may not be earlier than the date 3 months from the penalty date.
>
> If your failure to make the return continues six months after the penalty date, we may decide that you are liable to a further penalty (additional to any other penalties already imposed). The penalty amount is the greater of:
>
> - 5% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
> - £300.
>
> If your failure to make the return continues 12 months after the penalty date, we may decide that you are liable to a further penalty (additional to any other penalties already imposed). The penalty amount is the greater of:

- 5% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
- £300.

unless, by failing to make the return, you are deliberately withholding information which would enable or assist us to assess your tax liability, in which case the penalty amount is the greater of:

- 100% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
- £300.

You are liable to the daily penalties or the 6 month and 12 month further penalties even if we have not charged some or all of the previous penalties. For example, you can become liable to the six month further penalty even if we have not previously charged the daily penalties."

30. As can be seen, the final sentence seems to suggest that daily penalties might not be charged even although other penalties have been applied. Similarly at paragraphs three and four in saying: "….we may decide…" and "If we decide that you are liable to this penalty…" the suggestion is also that the daily penalties might not always be charged.

31. In *Donaldson* the Court agreed with the Upper Tribunal that:

> "…it is inherently unlikely that Parliament intended that HMRC should be required to make a decision by exercising the discretion on an individual taxpayer-by taxpayer basis"

and that was because the issue of individual circumstances, such as reasonable excuse, had been addressed elsewhere in the legislation. Again that is precisely the position in this appeal. Reasonable excuse and other individual circumstances where discretion can be exercised are to be found at Sections 174 *et seq* of RSTPA and, as we indicate at paragraph 26 above, the policy intention is that there is the possibility of waiver of penalties in addition to that.

32. The Court in *Donaldson* quoted the Upper Tribunal with approval at paragraph 14 making it explicit that: "In other words, what was contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers, or none".

33. Unfortunately, although the Penalty Notice includes the daily penalties, at no stage has Revenue Scotland explained whether that is a policy decision or a decision consciously taken by a decision maker having considered all of the individual circumstances.

34. Further if daily penalties are addressed on a case by case basis that would conflict with the reasoning articulated in *Donaldson.* We agree with both the Court of Appeal and Upper Tribunal in *Donaldson.*

35. Lastly in this context, and pertinently, we are very conscious that in all penalty cases the burden of proof initially lies with Revenue Scotland[6]. They have not established that a policy decision has been taken or when. Nor have they proved that a

[6] Khawaja v HMRC 2012 UKFTT 183 (TC)

decision maker looked at the daily penalties, considering anything other than reasonable excuse or special circumstances. We find that there has been no compliance with Section 161(b).

36. If we are wrong on Section 161(1)(b) then we must consider the following sub paragraph.

Section 161(1)(c)

37. In the Policy Memorandum, paragraph 107 is headed "Penalties – warning letters" and reads:

> "The Bill does not contain provision for warning letters from Revenue Scotland to the taxpayer in relation to penalties but as set out in Sections 150-151, 160, 162-163 and 181 of the Bill, the Scottish Ministers will have regulation making powers to make further arrangements for penalties (including provision for warning letters for example)."

No such regulations have been promulgated to date.

38. We focus on warning letters because paragraphs 21 and 22 of *Donaldson* read:

> "21. I cannot accept these submissions. First, to the extent that they depend on establishing the existence of a discretion, I have already rejected them. Secondly, the notices did not "merely" inform Mr Donaldson that he "might" be liable to a penalty. They both stated in terms that he *would* be liable to a £10 daily penalty for every day after 31 January 2012 that the return was not filed: "a £10 daily penalty will be charged" (SA Reminder); and "if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding" (SA 326 Notice). Thirdly, I reject the submission that para 4(1)(c) does not permit a notice to be given until P becomes liable for a penalty ie in advance of a failure to file the return after the end of the three month period. There is nothing in the language of sub-para (c) which restricts the timing of the giving of a notice in this way. Ms Murray has not suggested any reason why Parliament would have intended to do this. **All that HMRC is required to do is to inform P that it has decided that, if he continues to fail to file his return after the end of the three month period, he will be liable for a daily penalty of £10 for each day that the failure continues during the following 90 day period. Sub-para (c) requires notice to be given specifying the date from which penalty "is" payable. That can be done in advance of any default by P. It is a fair and sensible provision.**
>
> 22. These reasons for rejecting Ms Murray's submissions are not, in substance, different from those given by the UT."

39. Section 161(1)(c) imposes the condition that a notice must be issued specifying the date from which the penalty would become payable. We have highlighted in bold the Court's clear intimation that a warning notice must be served stipulating the date from which the penalty is payable. No warning letters were issued by Revenue Scotland.

40. That reasoning in Donaldson has since been analysed in a number of cases in the UK FTT. At paragraphs 17 and 18 of *Taliadoros-Hichri v HMRC*[7], Judge Richards stated:

> ''17. My overall conclusion is that Paragraph 4 of Schedule 55 sets out a list of requirements that must be satisfied before a taxpayer can be liable to daily penalties. Those conditions must be satisfied before HMRC can assess the penalty. I do not consider that conclusion to be at odds with the decision in *Donaldson*. Both in the Upper Tribunal and the Court of Appeal, the relevant issue in *Donaldson* was whether HMRC were entitled to issue a notice under paragraph 4(1)(c) before the

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> tax return in question was over three months late. Neither the Upper Tribunal nor the Court of Appeal considered the completely different question of whether HMRC could give notice under paragraph 4(1)(c) after daily penalties had been assessed.
>
> 18. My interpretation of paragraph 4 of Schedule 55 is consistent with the plain meaning of the words. Moreover, if the position were otherwise, HMRC could assess a taxpayer to daily penalties and issue a notice under paragraph 4(1)(c) months or years later. That would rob the requirement to serve notice of daily penalties of any force. I do not consider Parliament can have intended this outcome. On the contrary, Parliament must have intended that notice of daily penalties has to be given before daily penalties are assessed. That conclusion, together with the finding at [9] means that the daily penalties charged under paragraph 4 of Schedule 55 are not due."

We agree.

41. Further, Revenue Scotland have not followed their own guidance and have simply issued the Penalty Assessment Notice with no relevant preliminary notice or warning.

42. We therefore find that there has been no compliance with Section 161(c). Therefore the daily penalties cannot be upheld.

Daily penalties in general

43. *Donaldson* was concerned with penalties relating to the self-assessment regime where returns must be submitted by 31 October or 31 January. Accordingly HMRC can, and do, issue reminders and the £100 penalty automatically when a return is late. Of course, for LBTT the relevant date is linked to the transaction so Revenue Scotland cannot and do not know about any failure to file until the return is eventually submitted.

44. A similar problem has recently arisen in UK jurisprudence in relation to Non-Resident Capital Gains Tax Returns ("NRCGT"). In summary, HMRC utilised the same penalty provisions with which *Donaldson* and we are concerned. As with LBTT, the NRCGT return must be filed within 30 days of the date of the transaction but of course, until the return is filed HMRC will not be aware of the transaction and could not issue reminders, warnings or Notices. The penalties, including the daily penalties, were appealed by many taxpayers.

45. In the summer of 2017, a number of professional bodies including the Institute of Chartered Accountants in England and Wales and Chartered Institute of Taxation issued a news item explaining that, having sought clarification from HMRC, HMRC had now confirmed that they had reviewed daily penalties and these would no longer be issued and past such penalties would be withdrawn.

46. As Judge Thomas put it succinctly in *McGreevy v HMRC*[8] at paragraph 208 having observed that the penalty regime in Schedule 55 was by no means ideal and was not used for Stamp Duty Land Tax:

> "No one seems to have noticed that in relation to non-SA (self-assessment) cases the daily penalty regime in paragraph 4 Schedule 55 is wholly unsuited to a system where there is no continuing record and no notice to file."

[8] 2017 UKFTT 690 (TC)

That is precisely the case with LBTT.

General

47. For completeness, we address the concepts of reasonable excuse, special circumstances and proportionality.

Reasonable excuse

48. 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.

49. The reason for the failure to make the return was an oversight by the appellants compounded by an oversight by their agents. Those were mistakes, and unfortunately not unusual ones. The question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*[9] 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. …".

50. A simple oversight is a mistake but in the absence of any other information does not amount to a reasonable excuse. We agree with Judge Berner in *Barrett v HMRC*[10] where he stated at paragraph 154:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

Any taxpayer who is sent a tax return for signature would be expected to sign and return it within the relevant time limit. A failure such as this, without explanation of the reason(s), cannot amount to a reasonable excuse. They have not taken reasonable care.

Reliance on a third party as a reasonable excuse

51. Possibly the appellants might argue that they expected their lawyers to "chase" them and they relied on them. Is that a reasonable excuse? Judge Bishopp in *Ryan v HMRC*[11], which was a case about a penalty for late submission of a Stamp Duty return and so is very relevant here, stated:

[9] 2012 UKFTT 315 (TC)
[10] 2015 UKFTT 329 (TC)
[11] 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."

52. We agree. The appellants have not established a reasonable excuse in this instance.

Special circumstances

53. Having found that there is no reasonable excuse, and that therefore the decision that the penalty is payable is affirmed, as Judge Berner indicated in *Collis v Revenue & Customs Commrs*[12] ("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 ...".

54. Like reasonable excuse, special circumstances is not defined in RSTPA but the concept is to be found in the general tax law in the United Kingdom and in other statutory contexts.

55. Section 177 RTSPA gives Revenue Scotland discretion to reduce the penalty because of special circumstances. The Tribunal has exactly the same discretion. That is not the case in UK tax law (eg paragraph 22 Schedule 55 Finance Act 2009) where the FTT, in the first instance, has to decide whether HMRC's decision on special circumstances is "flawed" in a judicial review sense of that term.

56. 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*[13] 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".

57. 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)*[14] said "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

58. 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:

[12] 2011 UKFTT 588 (TC)
[13] 1978 1 W.L.R. 1207
[14] 1971 3 All ER 967

> "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.

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

60. 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*[15] *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 filing of the return. Revenue Scotland correctly state that there is no evidence beyond the fact that both the appellants and their agents seemed to have forgotten about it.

61. We agree with Judge Mosedale in *Welland v HMRC*[16] ("Welland") where she said at paragraphs 132 and 133:-

> "132. I will consider proportionality separately, but is it possible for the fact that the tax at stake was nil to mean that there are 'special circumstances'? Firstly, it is not an unusual circumstance: returns often have to be made where the tax is nil.
>
> 133. Moreover, I do not think Parliament intended it to be a special circumstance justifying reduction in a penalty for non-filing. If Parliament had intended that there would be an excuse for not filing a return where the tax was nil, it would simply have required that returns did not have to be made unless there was a tax liability. But as is clear from the legislation, Parliament did not do this. It wanted the returns to be made even where the tax liability was nil: presumably it wanted HMRC to be able to verify that no tax was owing. So the fact that no tax was owed by Mr Welland is not a special circumstance."

62. Lastly on this topic Revenue Scotland's guidance "RSTP3023–Reduction of a penalty for special circumstances" reads:

> "We may reduce penalties for special circumstances where imposing the penalties would be contrary to the clear compliance intention of the legislation applying to the penalty in question."

63. What then is the compliance intention of this penalty regime? Of course, the objective of each and every penalty provision is to promote compliance and deter non-compliance. Indeed both parties recognise that.

[15] 2012 UKFTT 364 (TC)
[16] 2017 UKFTT 870

64. The list of non-compliant behaviour is set out at paragraph 103 of the Policy Memorandum. The first such behaviour is "failure to provide a tax return, or to deliver any other document on or before the filing date". That is what happened in this instance.

65. The appellants have failed to establish that there should be a reduction for special circumstances.

Proportionality

66. We set out at some length in *Straid* the arguments on proportionality at paragraphs 91 to 100 and those are set out in full at Appendix 2. The primary question, derived from *Roth,* is:-

> "… 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?".

67. The principal feature and objective of the penalty regime is that there is a hierarchy of penalties linked to the seriousness of the statutory failure on the part of the taxpayer. In this case in the context of a time limit of 30 days, 641 days is very long.

68. Looking at time limits, we entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave (Property Services) Limited v HMRC*[17] which although dealing with the discretion to admit an appeal out of time nevertheless is of relevance and that reads:-

> "… time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

69. The delay in this case, looked at in that context, is very serious albeit it is an inevitable lengthy delay given the reason for the default.

70. The clear compliance intention of the penalty regime is to ensure compliance with the tax legislation by a hierarchy of penalties that are applied with care and which are proportionate. The Schedule 55 penalties have repeatedly been found to be proportionate in the UK jurisprudence in similar circumstances to those obtaining here. We also agree with Judge Mosedale at paragraph 144 of *Welland* where she says:

> "The system may be harsh: but because the penalties are graduated and may be relieved where there is a reasonable excuse or special circumstances, the scheme of the legislation is not plainly unfair".

71. The fact that no tax is due is not relevant. There are separate provisions relating to late payment of tax and these penalties are simply to ensure that returns are filed on time.

72. In our view the penalty scheme, viewed as a whole and subject to our findings in regard to the daily penalties, is rational and proportionate when judged against the policy objective of the legislation which is clearly set out in the Policy Memorandum.

[17] 2015 UKUT 254

Summary of Conclusions

What penalties can be imposed?

73. Firstly, the £100 penalty imposed in terms of Section 160 RSTPA, albeit it is conceded that it has properly been imposed, is indeed correctly imposed, since the return was late.

74. Secondly, as far as daily penalties are concerned, whilst the condition in Section 161(a) is clearly met, we find that as far as Section 161(b) is concerned, Revenue Scotland have not proved that either:

(a) A policy decision has been made by Revenue Scotland, not least because that flies in the face of the last line of their own guidance, or

(b) The decision-maker had made a conscious decision looking at the individual circumstances (not just reasonable excuse and special circumstances).

75. Thirdly, ultimately in this appeal, that does not matter because there has been no compliance with Section 161(1)(c). No notice "… specifying the date from which the penalty is payable" has been issued and therefore Section 161(2) cannot be engaged.

76. It is abundantly clear from the wording of Section 161(1) that the intention of the Scottish Parliament was clearly that each and every one of these conditions had to be met before the daily penalties could be imposed. It is for that reason that the preamble reads **if (and only if)** and then lists each of the conditions.

77. The daily penalties imposed in terms of Section 161 cannot be confirmed.

78. Furthermore, we have drawn attention to the jurisprudence relating to NRCGT, and particularly at paragraph 46 because if one looks at the interaction of Section 161(1)(c) and (3)(b) it is not actually possible for Revenue Scotland to impose these daily penalties where a return is filed late. That is because the penalty date is the day after the filing date and the date specified in the Notice, that must be given in terms of Section 16(1)(c), cannot be earlier than three months after the penalty date in terms of Section 161(3)(c).

79. That works for matters like self-assessment returns where the taxing authority and the taxpayer both know the filing and the penalty date. Where there is a stand-alone transaction as for LBTT and NRCGT only the taxpayer knows the filing and penalty dates. The taxing authority only becomes aware once the return is filed so the failure cannot continue beyond that point. By that time the three months, if applicable, will have expired.

80. We found that the appellants have not established that they took reasonable care since there is no explanation as to why they did not sign and send back the return. They have not established a reasonable excuse for the late filing since a mere error does not suffice, nor does reliance on a lawyer. There were no special circumstances.

81. In that context, we considered proportionality and whether the penalty regime as applied by Revenue Scotland in this instance is "not merely harsh but plainly unfair so that, … it simply cannot be permitted?" (see paragraph 66 above). By the appellant's own admission a

penalty of £100 is clearly not disproportionate or plainly unfair. Even if we are wrong in regard to the daily penalties, they meet the policy objectives as set out in the Policy Memorandum and are proportionate.

82. We agree with the findings of the Tribunal at paragraphs 48 to 51 in *William G Anderson v Revenue Scotland*[18] and those are set out at Appendix 3. We adopt those findings which support our finding that the penalty regime is proportionate. We do not accept that the penalty regime, in these individual circumstances, is so plainly unfair that it is disproportionate.

Decision

83. We accept Revenue Scotland's view of the matter in relation to the £100 penalty but, for the detailed reasons given above, we cancel the daily penalties of £900 and the £0 penalties.

84. 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 34 RSTPA and Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016. The 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: 1 February 2018

[18] 2016 TTFT 1

APPENDIX 1

Lands and Buildings Transaction Tax (Scotland) 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.

Revenue Scotland and Tax Powers Act 2014

159 Penalty for failure to make returns

(1) A penalty is payable by a person ("P") where P fails to make a tax return specified in the table below on or before the filing date (see section 82).

	Tax to which return relates	*Return*
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 2013.

(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.

161 Land and buildings transaction tax: 3 month penalty for failure to make return

(1) P is liable to a penalty under this section if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) Revenue Scotland decides that such a penalty should be payable, and

(c)Revenue Scotland gives notice to P specifying the date from which the penalty is payable.

(2) The penalty under this section is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under subsection (1)(c).

(3) The date specified in the notice under subsection(1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in subsection (1)(a).

162 Land and buildings transaction tax: 6 month penalty for failure to make return

(1) P is liable to a penalty under this section if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this section is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

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.

APPENDIX 2

Straid Farms Limited v Revenue Scotland

Proportionality

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

92. The Upper Tribunal in *HMRC v Total Technology*[19] ("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*[20] ("Mellat") and that reads:

> ''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

[19] 2012 UKUT 418 (TCC)
[20] 2013UKSC 39

> 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*[21] ("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*[22] ("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.

[21] [2003] QB 728
[22] 1986 8 EHRR 123

William G Anderson v Revenue Scotland

48. The penalty levied on WA is, in terms of the legislation, the first penalty for failure to make a return and is set at £100. The penalty regime continues to increase the penalty where the failure to make the return increases by three months, six months and 12 months and accordingly looks at successive defaults and imposes higher penalties the longer the failure to make a return lasts. There is, accordingly, a hierarchy of seriousness of breaches.

49. I have considered the circumstances of WA's penalty in terms of the four criteria expounded by Lord Sumption in *Bank Mellat*, where he said, in considering questions of rationality and proportionality:

> "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 objectives; (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".

50. I consider for the reasons set out by RS that it is sufficiently important to have a penalty regime to encourage compliance with the statutory requirements of the tax regime and that objective justifies in this instance the limitations of fundamental rights and that such a regime is rationally connected to that objective. The level of a first penalty for failure to make a return within a period of less than three months at £100 does not constitute an intrusive measure and I agree with RS that is not unreasonable. I believe, in this instance, that a fair balance has been struck between the rights of the individual and the interests of the community. The penalty applied is not "devoid of a reasonable foundation" and does not create a disproportionate interference with WA's A1P1 rights. It is likely that without a penalty regime, making tax returns would, as RS indicate, risk becoming effectively optional.

51. In considering the issue of the amount of the penalty in circumstances where there is, as in this case, no tax payable, I prefer the arguments of RS. There is no condition in the legislation that tax must be payable before a return must be submitted and has already been stated, in order to assess whether or not tax is payable, Revenue Scotland require to be notified of relevant transactions.