[2019] UKFTT 0606 (TC)

TC07389

ANNUAL TAX ON ENVELOPED DWELLINGS – penalties for late filing of returns and payment of ATED - schedules 55 and 56 Finance Act 2009 – whether non-resident taxpayer's ignorance of law was a reasonable excuse – no – whether HMRC's decision on special circumstances could be revisited - no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08084

BETWEEN

TYSIM HOLDINGS LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE TRACEY BOWLER
MRS SHEILA CHEESMAN

Sitting in public at Taylor House, Rosebery Avenue, London on 12 August 2019

The Appellant did not attend and was not represented.
Ms Helen Gould, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by the Appellant (referred to as "Tysim Holdings") against penalties totalling £4605 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6 of Schedule 55 Finance Act 2009 ("Schedule 55") and paragraph 3 of Schedule 56 Finance Act 2009 ("Schedule 56") for:

(1) the late filing by Tysim Holdings of Annual Tax on Enveloped Dwellings ("ATED") returns required under Section 159 Finance Act 2013 for the chargeable periods 2015-16, 2016-17 and 2017-18; and

(2) the late payment of the ATED for the same tax years.

2. The penalties that have been charged can be summarised as follows:

2015-16

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 28 June 2018;

(2) "daily" late filing penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 3 October 2018;

(3) a £300 "six month" late filing penalty under paragraph 5 of Schedule 55 imposed on 3 October 2018;

(4) a £300 "12 month" late filing penalty under paragraph 6 of Schedule 55 imposed on 3 October 2018;

(5) a £350 "30 days" late payment penalty under paragraph 3(2) Schedule 56 imposed on 22 November 2018;

(6) a £350 "six month" late payment penalty under paragraph 3(3) Schedule 56 imposed on 22 November 2018;

(7) a £350 "12 month" late payment penalty under paragraph 3(4) Schedule 56 imposed on 22 November 2018;

2016-17

(8) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 11 July 2018;

(9) a £350 "30 days" late payment penalty under paragraph 3(2) Schedule 56 imposed on 22 November 2018;

(10) a £350 "six month" late payment penalty under paragraph 3(3) Schedule 56 imposed on 22 November 2018;

(11) a £350 "12 month" late payment penalty under paragraph 3(4) Schedule 56 imposed on 22 November 2018;

2017-18

(12) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 September 2018;

(13) a £352.50 "30 days" late payment penalty under paragraph 3(2) Schedule 56 imposed on 22 November 2018;

(14) a £352.50 "six month" late payment penalty under paragraph 3(3) Schedule 56 imposed on 22 November 2018.

BACKGROUND

3. On 15 November 2017 Tysim Holdings wrote to HMRC with ATED returns for the tax years in question. The letter was received by HMRC on 20 November 2017. HMRC responded on 22 November 2017 saying that the returns were incomplete. Tysim Holdings registered for an HMRC Government Gateway account and filed the ATED returns online on 19 December 2017. Payment of the ATED was made by Tysim Holdings for each of the chargeable periods 2015-16, 2016-17 and 2017-18 on 20 December 2017.

4. On 18 October 2018 Tysim Holdings first sought to appeal to HMRC against penalty notices issued by HMRC. On 26 November 2018 HMRC rejected the appeal and offered a review.

5. Tysim Holdings appealed to the Tribunal on 14 December 2018.

6. The appeal to HMRC of the penalty notices issued in June, July and September 2018 was a late appeal. HMRC have now prepared a full Statement of Case which deals with the substantive appeals (and does not suggest that the Tribunal should refuse to deal with any of the appeals because they were made late to HMRC). We therefore consider that HMRC have now given consent under section 49(2)(a) of the Taxes Management Act 1970 ("TMA").

DECISION IN THE ABSENCE OF THE APPELLANT

7. No representative of Tysim Holdings attended the hearing and it was not represented at the hearing. However, emails from the Chairman and director of Tysim Holdings, Mr Chan Hua Eng, state clearly that Tysim Holdings expects the hearing to proceed in its absence. We were therefore satisfied that Tysim Holdings had been notified of the hearing and, in view of the evidence in the papers and the detailed submissions provided by Mr Chan Hua Eng, we considered it to be in the interests of justice to proceed with the hearing under Rule 33 of The Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009. The hearing proceeded by way of hearing the submissions of HMRC as set out in their Statement of Case.

FINDINGS OF FACT

8. The evidence consisted of the bundle prepared by HMRC, letters and emails from Mr Chan Hua Eng, including a letter dated 1 August 2019 from Mr Chan Hua Eng to the Tribunals' service, a response to HMRC's statement of case and a sheet of evidence about Mr Chan Hua Eng's background submitted by HMRC on 31 July 2019. Taking into account all of the evidence we made the following factual findings.

9. Tysim Holdings acquired a dwelling in London prior to 1 April 2012. The dwelling is a flat.

10. The value of Tysim Holdings' interest in the dwelling on 1 April 2012 was £1,100,000.

11. Following the introduction of the ATED, Tysim Holdings was due to submit an ATED return for the chargeable period 1 April 2015-31 March 2016 by 1 October 2015 and to pay the ATED by 31 October 2015.

12. Tysim Holdings was due to submit an ATED return and to pay the ATED for the chargeable period 1 April 2016 -31 March 2017 by 30 April 2016.

13. Tysim Holdings was due to submit an ATED return and pay the ATED for the chargeable period 1 April 2017-31 March 2018 by 30 April 2017.

14. Tysim Holdings was not aware of the ATED obligations until November 2017. Tysim Holdings contacted HMRC by fax on 8 November 2017 to inform HMRC about the ownership of the property and liability to pay the ATED. Tysim Holdings then attempted, without success, to file the ATED returns by post on 15 November 2017. The returns for the three chargeable periods were then successfully submitted on 19 December 2017 and payment of the ATED was made on 20 December 2017.

15. The penalty notices listed at the start of this decision were all received by Tysim Holdings.

16. Mr Chan Hua Eng is Chairman of Tysim Holdings. His son is the Chief Executive Officer and Managing Director of Tysim Holdings.

17. Mr Chan Hua Eng graduated from Bristol University in 1952 with a Batchelor of Law degree. He was called to the Bar at Middle Temple in 1953. Until his retirement in 1987 he was the senior partner of a large legal firm in Kuala Lumpur. He is an associate member of the Institute of Taxation.

18. The property is owned by Tysim Holdings for use by members of Mr Chan Hua Eng's family.

19. Tysim Holdings does not own, or have an interest in, any other dwellings in the UK.

GROUNDS OF APPEAL

20. The grounds of appeal in the notice of appeal can be summarised as follows:

(1) Tysim Holdings had a reasonable excuse for the late submission of the returns and payment of the ATED;

(2) there were special circumstances which mean that the penalties imposed for the late submission of the returns and payment of the ATED should be reduced;

(3) the penalties imposed on Tysim Holdings are not justified and are out of proportion to the facts. It is harsh to expect a person resident in another country to know about the introduction of a new law.

THE APPELLANT'S CASE

21. In summary, Tysim Holdings submits that:

(1) it is accepted that HMRC were correct to issue the penalties imposed by them on Tysim Holdings; but

(2) Tysim Holdings had a reasonable excuse for the failure to file returns and pay the ATED because:

(a) the application of the reasonable excuse provisions by reference to a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the relevant legislation, puts too high a responsibility upon a taxpayer where entirely new legislation is introduced without any accompanying fanfare or public announcement. This is particularly the case where the taxpayer is located in a foreign country and has no business in the UK apart from owning one flat;

(b) it is unreasonable to expect a taxpayer to check whether there is new legislation on a continuous daily basis;

(c) Tysim Holdings had acted in an exemplary manner correcting the situation as soon as it was aware of the obligations;

(d) the appeal process is intended to ameliorate the harshness of the application of the presumption that a taxpayer is expected to know the law;

(e) the Tribunal should decide whether there is an acceptable excuse and, if so, the degree of culpability that can be attributed to the Appellant so as to justify and non-imposition of the penalties, or the amount that should be remitted to mitigate the severity of the punishment;

(f) the judgement of Judge Mosedale in *Robert Welland v HMRC [2017] UKFTT 0870 (TC)* still allows for a reasonable excuse for not complying with the law, particularly where there was no deliberate intention not to comply;

(g) the decision of Judge Medd in *The Clean Car Company Ltd v C&E Comrs [1991] VATR 239* had the idea of a trader in mind. The description of the approach to the application of test of reasonable excuse is not appropriate in the situation of Tysim Holdings which just happened to own one piece of property intended for use by family members of its few shareholders and which was not in the business of property ownership;

(h) the approach in the case of *Christine Perrin v. HMRC [2018] UKUT 156* described by HMRC in its Statement of Case should be applied;

(i) the case of *Louisa Templar v HMRC [2018] UKFTT 739 (TC)* should be distinguished;

(j) HMRC should have taken into account Tysim Holdings' behaviour once it was aware of its obligations.

HMRC'S CASE

22. HMRC maintains that Tysim Holdings did not take sufficient care in relation to its statutory obligations. The actions of a taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. 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. In doing so HMRC relies upon the cases of *Clean Car* and *Perrin*.

23. Ms Gould submitted that account should be taken of the fact that the Chairman of Tysim Holdings, Mr Chan Hua Eng, is a qualified barrister who had practised in the UK and in Kuala Lumpur and has been a member of the Institute of Taxation.

24. HMRC maintains that it cannot be said that all non-residents will have a reasonable excuse for failing to submit a tax return and make payment if they were unaware of a specific tax obligation. Similarly, HMRC would not accept that a generic explanation that a taxpayer was unaware of a change of law, or that the regime was complex, met the required objective level of reasonableness to be considered a reasonable excuse for failure.

25. HMRC relies upon the decision of Judge Mosedale in the case of case of *Welland* to maintain that ignorance of the law cannot have been intended by Parliament (in general at least) to amount to a reasonable excuse for not complying with it. HMRC also relies upon the decision in *Louisa Templar* where the Tribunal decided that the fact that the taxpayer did not take any steps to determine the UK tax reporting requirements, and instead relied upon her assumptions as to the state of the law, meant that it was not objectively reasonable taxpayer to have been ignorant of the requirement in question. Ms Gould submitted that no steps had been taken by, or on behalf of, Tysim Holdings to check its UK obligations before November 2017.

26. In relation to "special circumstances" HMRC maintains that for circumstances to be special they must be "exceptional, abnormal or unusual" applying the case of *Crabtree v Hinchcliffe [1971] 3 All ER 967* or "something out of the ordinary run of events" applying *Clarks of Hove Ltd v Bakers' Union [1978] 1WLR 1207*. In either case special circumstances need to be specific to the taxpayer. HMRC does not consider Tysim Holdings' lack of knowledge of the ATED requirements to have been a special circumstance.

27. Ms Gould relied upon the decision in *Hok [2012] UKUT 363 (TC)* in relation to Tysim Holdings' claim that the ATED regime is harsh or unfair.

THE LAW

28. The ATED was announced in the Budget of 21 March 2012. The ATED legislation was introduced in the Finance Act 2013. Guidance was first published on the ATED on the HMRC website on 4 August 2013.

29. Initially the ATED only applied to properties valued at more than £2 million on 1 April 2012.

30. In the Budget of 19 March 2014 it was announced that the threshold for the application of the ATED would be reduced to £1 million with effect from 1 April 2015 and then to £500,000 with effect from 1 April 2016.

31. ATED returns were brought within the scope of Schedule 55 and Schedule 56 when the ATED was introduced. The effect of this is that penalties are payable if an ATED return is delivered late or payment of ATED is made late.

32. The late filing penalties are as follows:

(1) A fixed penalty of £100;

(2) a daily penalty of £10 up to a maximum of 90 days if the return is more than three months late;

(3) a further penalty of the greater of 5% of the tax due and £300 if the return is more than six months late; and

(4) an additional penalty of the greater of 5% of the tax due and £300 if the return is more than 12 months late.

31. The late payment penalties are as follows:

(1) an initial penalty of 5% of the unpaid tax if the tax is not paid 30 days after the payment date. The date 30 days after the payment date is the "penalty date"

(2) a penalty of 5% of the unpaid tax if the tax is not paid after the end of 5 months beginning with the penalty date; and

(3) a penalty 5% of the unpaid tax if the tax is not paid after the end of 11 months beginning with the penalty date.

32. Tysim Holdings' grounds of appeal rely on three assertions:

(1) that Tysim Holdings had a reasonable excuse for the late submission of the ATED returns and the payment of the ATED for the relevant chargeable periods;

(2) that "special circumstances" applied which mean that HMRC should have reduced the penalties imposed on Tysim Holdings;

(3) that the penalties imposed are disproportionate and excessive.

33. Reliance upon having a reasonable excuse for the late submission of the returns and payment of the ATED depends upon the application of paragraph 23 of Schedule 55, paragraph 16 of Schedule 56 and the guidance provided in case law; in particular, the case of *Perrin*, to the facts of this case.

34. In *Perrin* the Upper Tribunal held as follows:

> "When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

35. HMRC can also reduce a penalty because of "special circumstances" under paragraph 16 of Schedule 55. We can only interfere with HMRC's decision if we think that the decision in respect of the application of the special circumstances provisions is "flawed" when considered in the light of principles applicable to judicial review.

36. In *Clarks of Hove Ltd* it was stated that:

> "… To be special the event must be something out of the ordinary, something uncommon,…".

37. More recently in *Advanced Scaffolding (Bristol) Limited v HMRC [2018] UKFTT 0744 (TC)* it was stated at [101] and [102]:

> "It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

38. The *Advanced Scaffolding* approach was recently endorsed by the Upper Tribunal in the case of *Barry Edwards v HMRC [2019] UKUT 0131 (TC).*

39. The claim that the application of the ATED by HMRC is disproportionate or harsh or unfair must be considered in the light of the Upper Tribunal decisions in *Barry Edwards v HMRC* and *Hok*.

40. In *Barry Edwards*, the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

41. In *Hok* the Upper Tribunal stated at [36] that the First-Tier Tribunal:

> "…has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair".

42. Although *Hok* was concerned with the VAT rules rather than the ATED ones, it is clear that the principle applies to all penalties.

43. The burden of proof is on HMRC to show that the necessary conditions were met for the issue of penalties. The burden of proof is then on Tysim Holdings to show that it had a reasonable excuse for the late filing of his tax return. In each case the standard is the usual civil standard of balance of probabilities.

44. The relevant legislation is set out in an appendix to this decision.

DISCUSSION

45. The responsibility for filing an ATED return on time rests squarely with the taxpayer. In contrast to other penalty situations, there is no obligation on HMRC to issue a notice to file. This is because HMRC is not aware of the ATED arsing until it is informed by a taxpayer. However, HMRC is still required to show that the penalty notices were correctly issued.

46. There is no doubt, and it is accepted by Mr Chan Hua Eng, that Tysim Holdings filed the ATED returns late and paid the ATED late so that HMRC were, in principle, entitled to charge the penalties.

47. Furthermore, it is expressly accepted by Tysim Holdings that the penalties were correctly imposed under the legislation and that the notices were received by the company. Tysim Holdings is not disputing that HMRC has discharged the burden of proof on it and we find that HMRC has done so. However, we should (for the avoidance of doubt) address matters which are apparent on the face of the penalty notices, even though these have not been raised as issues by Tysim Holdings.

48. The first concerns the fact that the initial penalty notice sent to the company on 28 June 2018 contained an error. While it correctly states that the return for the year ending 31 March 2016 should have been submitted by 1 October 2015, it then proceeds to say that a daily penalty would be charged for returns received more than three months late starting from 1 August 2015. Ms Gould accepted at the hearing that this date was incorrect.

49. The error on the notice does not affect its validity. It correctly states the basis on which the £100 initial penalty was payable and, in any event, the provisions which apply under Schedule 55 for the initial £100 penalty to be issued are automatic.

50. The issue is the impact (if any) on the daily penalty notice. The relevant provisions in paragraph 4 of Schedule 55 state that:

> "(1) P is liable to a penalty under this paragraph if (and only if) –

> (a) P's failure continues after the end of the period of three months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable….

51. The error made in the 28 June 2018 notice was corrected in the notice of 3 October 2018 which stated that the daily penalty was charged from 2 January 2016. That notice therefore complied with the requirements of paragraph 4 Schedule 55.

52. The second issue concerns the fact that the notices and, in particular, the daily penalty notices were issued after the periods to which they related. We agree with the conclusions of Judge Vos in *Chartridge Developments Limited [2016] UKFTT 766 (TC)* and are satisfied that the validity of the notices is not affected by their timing because of the provisions of paragraph 4 (3) Schedule 55 which states:

> …(3)The date specified in the notice under sub – paragraph (1)(c) –
>
> (d) may be earlier than the date on which the notice is given, but
>
> (e) may not be earlier than the end of the period mentioned in sub – paragraph (1)(a).

53. It has therefore been expressly envisaged in paragraph 4(3) that the date from which the penalty is payable may be earlier than the date on which the notice is given. We are therefore satisfied that the fact that the penalty notices were issued after the periods to which they related does not render them invalid.

54. The Tribunal has no general discretion to reduce or set aside penalties. We must therefore uphold the penalties which were properly imposed unless there is a legal reason to set them aside. We therefore now deal with each of the bases claimed by Tysim Holdings as the reason to set them aside.

Reasonable excuse

55. Tysim Holdings must prove that it had a reasonable excuse; and that the ADET returns were submitted and the ADET paid without unreasonable delay after the excuse ceased.

56. Mr Chan Hua Eng agrees on behalf of Tysim Holdings that the correct approach to the question of whether the company had a reasonable excuse for the failures to file and pay the ATED on time is that set out in the case of *Perrin*. That is the approach, as set out above in this decision, which we have applied.

57. Mr Chan Hua Eng accepts that a person cannot rely upon ignorance of the law as a general matter, but maintains that the change in the law when the ATED was introduced provides a reasonable excuse for the failure of Tysim Holdings (which only owned one property and was not present in the UK to hear of the change) to comply with the ATED obligations.

58. HMRC refers to decisions in the First Tier Tribunal addressing whether ignorance of the law can constitute a reasonable excuse.

59. In *Robert Welland* Judge Mosedale said:

> "Parliament must make laws with the intention they will be obeyed. Therefore, it follows that Parliament must expect people to make an effort to acquaint themselves with the law. Parliament is unlikely to have intended those who don't comply with the law to be excused the penalty simply because they did not know the law: that would encourage people not to make an effort to know the law (as they would be excused non-compliance with laws they didn't know about.)

> So it follows that ignorance of the law cannot have been intended by Parliament (in general at least) to amount to a reasonable excuse for not complying with it. *Neal* recognised an exception for complex, uncertain law but (in line with Parliament's intent), if such exception exists at all, it must be a rare exception…"

60. That case concerned a taxpayer who had failed to submit non-resident capital gains tax returns ("NRCGT"). Such returns are generally required where non-residents dispose of, among other things, residential property interests in the UK. The taxpayer knew that he had to report the sale of properties owned by him and wrongly assumed it was enough to do so on his normal self-assessment tax return. Judge Mosedale decided that the law concerned was not complex or uncertain and the only reason the taxpayer did not file on time was that he did not know about the NRCGT reporting requirements. That, ignorance of the reporting requirement could not constitute a reasonable excuse.

61. In *Louisa Templar v. HMRC* [2018] UKFTT 739 the taxpayer was again appealing penalties imposed under the NRCGT regime. That case was decided after *Perrin* which has set out the approach to be taken when considering the existence of a reasonable excuse. Judge Fairpo applied *Perrin* and decided that a taxpayer in the position of Ms Templar with a responsible attitude to their duties as a taxpayer and who had not taken any steps to determine the UK tax reporting requirements did not have a reasonable excuse for her failure to file the return on time as a result of her lack of knowledge of UK tax law.

62. Although Mr Chan Hua Eng says that the *Louisa Templar* case should be distinguished, he does not set out the basis for doing so. *Welland* and *Louisa Templar*, being decisions of the First Tier Tribunal, are not binding upon us, but we respectfully agree with the approach described by Judge Fairpo in the latter. We consider that the question of whether ignorance of law is a reasonable excuse must be viewed, just as other claimed reasonable excuses, through the lens of the *Perrin* approach. Indeed, in *Perrin* it was said (albeit as obiter dicta) that there is no basis for the argument that reasonable excuse cannot arise where a person relies upon ignorance of the law. Instead it should be considered whether it was "objectively reasonable for the particular taxpayer in the circumstances of the case to have been ignorant of the requirement in question, and for how long."

63. We are therefore of the view that consideration of whether ignorance of the law has given rise to a reasonable excuse requires a detailed consideration of all the relevant facts, considering all the circumstances of the taxpayer, as well as the nature and complexity of the tax requirement. Ignorance of the law may therefore, in appropriate circumstances, and having regard to the particular attributes of the taxpayer, give rise to a reasonable excuse.

64. Mr Chan Hua Eng is the Chairman of Tysim Holdings. It is a company which has owned one property in London for the benefit of family members of its few shareholders. Although Mr Chan Hua Eng has been retired for some years, his correspondence shows that he is a highly articulate and well-informed person and that he is still actively involved in the company's affairs. He qualified as a barrister in the UK after gaining a law degree in this country and was a member of the Institute of Taxation. He practised as a lawyer advising companies for some 34 years until 1987. He is therefore a person whom we would expect to have been well aware of the fact that tax rules frequently change.

65. We would expect an investor holding an interest in real property in a foreign country to take steps to ensure that they were aware of changes in the law of the country of the investments which could affect their interests. That expectation is not restricted to checking tax rules. It does not mean that the law needs to be checked on a daily basis as Mr Chan Hua Eng suggests is implied by HMRC, but we would expect a reasonably prudent person holding an investment in a dwelling in another country to check the local requirements, at least annually, through a local advisor. Given Mr Chan Hua Eng's background we would expect him to be particularly

aware of the frequency of tax change and the necessity to check the position locally from time to time. Although Mr Chan Hua Eng has been retired for some years now it is clear from his correspondence with HMRC and his submissions that he is still actively engaged on matters which affect Tysim Holdings.

66. The ADET was initially proposed in the Budget in March 2012 with the new rules to be introduced from 1 April 2013. A consultation followed the announcement and before implementation of the proposals in the Finance Act 2013. It was announced in the Budget in March 2014 that the threshold would be reduced from £2 million to £1 million with effect from 1 April 2015. Therefore there was a period of more than one year between March 2014 and April 2015 in which a simple enquiry to check whether UK regulations had changed would have made the ATED obligations of Tysim Holdings apparent.

67. Tysim Holdings was not aware of its obligations under the new rules until 2017. There is no evidence to show how the obligations were discovered, but November 2017 is more than 3 ½ years after the change to the threshold was announced. There is no evidence that any attempt was made prior to November 2017 to check the state of the law. Even without Mr Chan Hua Eng's background and experience, we would expect a reasonably prudent investor in overseas property to check the regulatory position more frequently than once in three years. Therefore even if Mr Chan Hua Eng had not been actively involved with Tysim Holdings' affairs at the time we would expect that more frequent checks would be carried out for the company.

68. The obligation to file the ATED returns and pay the ATED is not tucked away in a remote and inaccessible part of highly complex legislation. It should therefore be something which would be immediately identified as applicable by anyone with familiarity with the UK tax system. If that was not something that Mr Chan Hua Eng felt able to do himself we would expect the company to have checked the position elsewhere.

69. Although there are some complexities in the calculation of the amount of the ATED for certain property investors, Tysim Holdings is not such an investor. As soon as the obligation was discovered the ATED amount was calculated. It has not been suggested that there was any confusion or problem in working out the amount payable, or, indeed, the dates on which the returns were due. It is simply that the obligations were not known.

70. Given all these conclusions, we find that Tysim Holdings did not have a reasonable excuse for the late submission of the ATED returns and late payment of the ATED for the chargeable periods 2015-16, 2016-17 and 2017-18.

Special circumstances

71. The assertion that Tysim Holdings did not have the opportunity to correct its behaviour when the penalty notices were issued and that its swift action when it was aware constitutes "special circumstances" which justify us allowing the appeal does not have merit for the following reasons.

72. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. We can only reach a different decision if we consider that HMRC's decision was "flawed" when considered in the light of the principles applicable in judicial review proceedings. We conclude that there is no such basis arising from the fact that Tysim Holdings was not aware of its obligations or from the fact that it promptly complied once aware of them.

73. We have addressed the retrospective effect of the notices above in the context of the validity of the notices. Mr Chan Hua Eng has submitted that the fact that the notices were issued retrospectively meant that the company did not have the opportunity to correct its behaviour and that should be treated as a "special circumstance". However, as explained above the

legislation specifically contemplates notices being issued in circumstances where the taxpayer cannot correct its behaviour in order to avoid the penalty because the penalty notices can be issued after the relevant time for compliance. We are therefore satisfied that this cannot give rise to a "special circumstance".

Proportionality

74. Tysim Holdings has argued that the penalties charged are disproportionate. This argument was addressed in the *Barry Edwards* Case. The Upper Tribunal determined that even where a taxpayer has no tax to pay, that does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate. As a consequence, it was decided that the level of the prescribed penalty is not a relevant circumstance which HMRC should take into account when considering whether special circumstances justify a reduction in a penalty.

75. That conclusion that the penalty regime establishes a fair balance between the public interest in compliance and the financial burden imposed on individual taxpayers means that we are not able to find that the levels of the prescribed penalties should have been reduced by HMRC under the special circumstances provisions, even though Tysim Holdings acted swiftly when it realised its obligations.

76. We have no power to reduce the penalties on the basis of some more generalised claim of unfairness as made clear by *Hok*.

DECISION

77. For all these reasons we have therefore decided that Tysim Holdings' appeal is dismissed and the penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 27 SEPTEMBER 2019

APPENDIX

Section 31 TMA 1970 Appeals: right of appeal

(1) An appeal may be brought against—
(*a*) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
(*b*) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
(*c*) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
(*d*) any assessment to tax which is not a self-assessment.

Section 31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given—
(*a*) in writing,
(*b*) within 30 days after the specified date,
(*c*) to the relevant officer of the Board.
(2) In relation to an appeal under section 31(1)(*a*) or (*c*) of this Act—
(*a*) the specified date is the date on which the notice of amendment was issued, and
(*b*) the relevant officer of the Board is the officer by whom the notice of amendment was given.
(3) In relation to an appeal under section 31(1)(*b*) of this Act—
(*a*) the specified date is the date on which the closure notice was issued, and
(*b*) the relevant officer of the Board is the officer by whom the closure notice was given.
(4) In relation to an appeal under section 31(1)(*d*) of this Act [(other than an appeal against a simple assessment)][3]—
(*a*) the specified date is the date on which the notice of assessment was issued, and
(*b*) the relevant officer of the Board is the officer by whom the notice of assessment was given.

Section 49 Late notice of appeal

(1) This section applies in a case where—
(*a*) notice of appeal may be given to HMRC, but
(*b*) no notice is given before the relevant time limit.
(2) Notice may be given after the relevant time limit if—
(*a*) HMRC agree, or
(*b*) where HMRC do not agree, the tribunal gives permission.
(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

SCHEDULE 55 FINANCE ACT 2009 - PENALTY FOR FAILURE TO MAKE RETURNS ETC

Paragraph 1

(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date. 11

(2) Paragraphs 2 to 13 set out -
(a) the circumstances in which a penalty is payable, and
(b) subject to paragraphs 14 to 17, the amount of the penalty.
(3) If P’s failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).
(4) In this Schedule—
“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;
“penalty date”, in relation to a return or other document falling within any of items 1 to 3 and 5 to 13A in the Table, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

Paragraph 3

P is liable to a penalty under this paragraph of £100.

Paragraph 4

(1) P is liable to a penalty under this paragraph if (and only if)—
(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
(b) HMRC decide that such a penalty should be payable, and
(c) HMRC give notice to P specifying the date from which the penalty is payable.
(2) The penalty under this paragraph 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 sub-paragraph (1)(c).
(3) The date specified in the notice under sub-paragraph (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 sub-paragraph (1)(a).
34. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

Paragraph 5

(1) P is liable to a penalty under this paragraph 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 paragraph is the greater of—
(a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

Paragraph 16

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
(2) In sub-paragraph (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) …

Paragraph 23

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
(2) For the purposes of sub-paragraph (1) -
(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.

Paragraph 20 Appeal

(1) P may appeal against a decision of HMRC that a penalty is payable by P.
(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

Paragraph 22

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
(a) affirm HMRC's decision, or
(b) substitute for HMRC's decision another decision that HMRC had power to make.
(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

Penalty for failure to pay tax

(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(*a*) the circumstances in which a penalty is payable, and

(*b*) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the day after the date specified in or for the purposes of column 4 of the Table in relation to that amount.

Extract from table:

(1) Item 10A - Annual tax on enveloped dwellings

(2) Amount payable under section 161(1) or (2) of FA 2013 (except an amount falling within item 23).

(3) The date falling 30 days after the date specified in section 161(1) or (2) of FA 2013 as the date by which the amount must be paid

3 Amount of penalty: occasional amounts and amounts in respect of periods of 6 months or more

(1) This paragraph applies in the case of—

(*a*) a payment of tax falling within any of items 1, 3, 3B, 3C and 7 to 24 in the Table,

(*aa*) a payment of tax falling within item 4A or item 6ZB in the Table,

(*b*) a payment of tax falling within item 2 or 4 which relates to a period of 6 months or more, and

(*c*) a payment of tax falling within item 2 which is payable under regulations under section 688A of ITEPA 2003 (recovery from other persons of amounts due from managed service companies).

(*ca*) an amount in respect of apprenticeship levy falling within item 4A which is payable by virtue of regulations under section 106 of FA 2016 (recovery from third parties).

(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.

11 Assessment

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of an amount of tax which was due or payable.

(4A) If an assessment in respect of a penalty is based on an amount of tax due or payable that is found by HMRC to be excessive, HMRC may by notice to P amend the assessment so that it is based upon the correct amount.

(4B) An amendment made under sub-paragraph (4A)—

(a) does not affect when the penalty must be paid;

(b) may be made after the last day on which the assessment in question could have been made under paragraph 12.

12

(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the date specified in or for the purposes of column 4 of the Table (that is to say, the last date on which payment may be made without incurring a penalty).

(3) Date B is the last day of the period of 12 months beginning with—

(*a*) the end of the appeal period for the assessment of the amount of tax in respect of which the penalty is assessed, or

(*b*) if there is no such assessment, the date on which that amount of tax is ascertained.

(4) In sub-paragraph (3)(*a*) "appeal period" means the period during which—

(*a*) an appeal could be brought, or

(*b*) an appeal that has been brought has not been determined or withdrawn.

13 Appeal

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

14

(1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(*a*) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(*b*) in respect of any other matter expressly provided for by this Act.

15

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(*a*) affirm HMRC's decision, or

(*b*) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

(*a*) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(*b*) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(*b*) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

16 Reasonable excuse

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(*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.