Neutral Citation: [2022] UKFTT 00286 (TC)

Case Number: TC08568

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2021/00552

ANNUAL TAX ON ENVELOPED DWELLINGS – Whether ATED relief return filed late – yes – Whether reasonable excuse established – no – appeal dismissed

Judgment date: 15 August 2022

Decided by:

JUDGE NATSAI MANYARARA

Between

MATRIX RENTAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 28 June 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases), having first read the Notice of Appeal, HMRC's Statement of Case, the Document Bundle and the Legislation and Authorities Bundle.

DECISION

INTRODUCTION

1. The Appellant is appealing against penalties ('the Penalties') that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") in respect of the late filing of an Annual Tax on Enveloped Dwellings ('ATED') relief return for the year ended 31 March 2019, as required by s. 159 of the Finance Act 2013 ('FA 2013').

2. The Penalties charged on the Appellant arose as follows:

Year Ending	**Date of Penalty**	**Type of Penalty**	**Amount**
31 March 2019	29 November 2019	Late Filing Penalty	£100[1]
31 March 2019	10 January 2020	Six-month Penalty	£300
		Total	**£400**

3. As HMRC did not specify the correct date in the notice, the daily penalties are invalid and have been withdrawn. The return was due on 30 July 2018, which would make the penalty date 31 July 2018, and not 30 July 2018 as stated in the notice.[2] This raised the legal issue as to whether a notice, under para. 4(1)(c) of Schedule 55, could have been validly issued so as to discharge the burden of proof on HMRC for daily penalties to be imposed. As the daily penalties have been withdrawn, the issue of validity of the daily penalties falls away.

BACKGROUND FACTS

4. The Appellant purchased a property for £735,000.00, on 3 July 2018. An ATED filing was made on 25 February 2019. On 29 November 2019, HMRC issued a notice of penalty assessment, in the amount of £100, and on 10 January 2020, HMRC issued a notice of penalty assessment in the amount of £300.

5. On 21 January 2020, the Appellant appealed against the Penalties. On 15 June 2020, HMRC offered to extend the deadline to appeal until 15 September 2020, due to the COVID-19 pandemic.

6. On 19 June 2020, the Appellant agreed to receive correspondence electronically, and on 15 September 2020, HMRC issued their decision and offered a review. On 4 November 2020, HMRC, issued a further letter offering to extend the review deadline until 4 February 2021, due to the pandemic. HMRC proceeded on the assumption that the Appellant agreed to an extension unless HMRC were advised otherwise. Having received no objection to the

[1] The Appellant has paid the late filing penalty of £100.
[2] The daily penalties were in the amount of £900 and the original sum of the penalties had been £1,300.

extension, HMRC issued their review conclusion to the Appellant on 15 February 2021, upholding the Penalties.

THE PARTIES' RESPECTIVE POSITIONS

7. HMRC's case can be summarised as follows:

(1) The filing date for the ATED relief return for the period ending 31 March 2019 was 30 July 2018. The return must be delivered by the end of the period of 30 days beginning with the first day in the period in which the person is within the charge with respect to the interest.

(2) Records show that the Appellant's ATED relief return was received on 25 February 2019. The return identified the first date in the period as 1 July 2018. The Appellant's return was, therefore, submitted 210 days late. A penalty therefore applies.

(3) The late filing penalty advised that should the failure continue after the end of the period of three months, beginning with the penalty date, then daily penalties would apply from 30 October 2018[3].

(4) Any penalties must be issued within the timescale provided for in para. 19(2) of Schedule 55. The cut-off date for issuing the Penalties was 30 July 2020. The late filing penalty was issued on 29 November 2019 and the six-month penalty was issued on 10 January 2020. The Penalties have been issued within the time-limit.

(5) There is no requirement within FA 2013 for HMRC to issue a notice to file in respect of an ATED relief return.

(6) HMRC's guidance is clear and unambiguous. The Appellant's misunderstanding of the due date for the return is not objectively reasonable.

(7) The Appellant has not explained why he expected his legal adviser to give tax advice.

(8) The Penalties are proportionate.

8. The Appellant's grounds for appealing against the Penalties can be summarised as follows:

(1) HMRC's guidance was unclear and misleading as to the filing deadline. The impression was that the return had to be filed before 1 April 2019.

(2) Further, or alternatively, no tax liability was due.

(3) Further, or alternatively, HMRC have never sent a letter regarding the ATED relief return.

(4) Further, or alternatively, at no point did the Appellant's legal advisers advise that the ATED relief return was due.

(5) HMRC have failed to respond to the appeal in time.

[3] The correct date should be 31 October 2018. The daily penalties have been withdrawn as a result.

APPLICABLE LAW

9. The relevant law, so far as is material to the issues in this appeal, is as follows:

*"**Finance Act 2019***

159 Annual tax on enveloped dwellings return

(1) Where tax is charged on a person for a chargeable period with respect to a single-dwelling interest the person must deliver a return for the period with respect to the interest.

(2) A return under subsection (1) must be delivered by the end of the period of 30 days beginning with the first day in the period on which the person is within the charge with respect to the interest.

(3) If the first day in the chargeable period on which the person is within the charge with respect to the interest ("day 1") is a valuation date only because of section 124 (new dwellings) or section 125 (dwellings produced from other dwellings)-

(a) subsection (2) does not apply, and

(b) the return must be delivered by the end of the period of 90 days beginning with day 1.

(3A) Where a person-

(a) would (apart from this subsection) be required in accordance with subsection (2) to deliver a return for a chargeable period ("the later period") by 30 April in that period, and

(b) is also required in accordance with subsection (3) to deliver a return for the previous chargeable period by a date ("the later date") which is later than 30 April in the later period,

subsection (2) has effect as if it required the return mentioned in paragraph (a) to be delivered by the later date.

(4) A return under this section must be delivered to an officer of Revenue and Customs, and is called an "annual tax on enveloped dwellings return".

59A Relief declaration returns

(1) "Relief declaration return" means an annual tax on enveloped dwellings return which—

(a) states that it is a relief declaration return,

(b) relates to one (and only one) of the types of relief listed in the table in subsection (9), and

(c) specifies which type of relief it relates to.

(2) A relief declaration return may be made in respect of one or more single-dwelling interests.

(3) A relief declaration return delivered to an officer of Revenue and Customs on a particular day ("the day of the claim") is treated as made in respect of any single-dwelling interest in relation to which the conditions in subsection (4) are met (but need not contain information which identifies the particular single-dwelling interest or interests concerned).

(4) The conditions are that—

(a) the person making the return is within the charge with respect to the single-dwelling interest on the day of the claim;

(b) the day of the claim is relievable in relation to the single-dwelling interest by virtue of a provision which relates to the type of relief specified in the return (see subsection (9));

(c) none of the days in the pre-claim period is a taxable day.

(5) The statement under subsection (1)(a) in a relief declaration return is treated as a claim for interim relief (see section 100) with respect to the single-dwelling interest (or interests) in respect of which the return is made.

(6) Subsection (7) applies where—

(a) a person has delivered to an officer of Revenue and Customs on any day a relief declaration return for a chargeable period with respect to one or more single-dwelling interests ("the existing return"), and

(b) there is a subsequent day ("day S") in the same chargeable period on which the relevant conditions are met in relation to another single-dwelling interest.

(7) The existing return is treated as also made with respect to that other single-dwelling interest.

(8) For the purposes of subsection (6)(b), the "relevant conditions" are the same as the conditions in subsection (4), except that for this purpose references in subsection (4) to the day of the claim are to be read as references to day S."

DISCUSSION

10. This is an appeal by the Appellant against the imposition of late filing penalties. The Penalties were imposed in respect of the late filing of an ATED relief return. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute.

11. The issues under appeal are firstly, whether HMRC were correct to issue the Penalties in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the defaults which have occurred. In this regard, HMRC bear the initial burden of demonstrating that the Penalties are due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse. Two further questions arise in determining this appeal. They are: if the Appellant is in default of an obligation imposed by statute: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period?

12. The above matters are to be considered in light of all the circumstances of the case.

13. In *Perrin v R & C Commrs* [2018] BTC 513, at [69] ('*Perrin*'), the Upper Tribunal explained the shifting burden of proof as follows:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, *prima facie*, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities,

the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

14. The factual prerequisite is, therefore, that HMRC have the initial burden of proof: *Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) ('*Burgess & Brimheath*' - in the context of a discovery assessment).

15. The standard of proof is the civil standard; that of a balance of probabilities.

16. From the papers before me, I make the following findings of fact and give my reasons for the decision:

Findings of fact

17. On 3 July 2018, the Appellant purchased a property for £735,000.00. The intention was to develop the property and provide affordable accommodation for young professionals. The filing date for the ATED relief return was 30 July 2018. The Appellant's return was only received on 25 February 2019. This was 210 days late.

18. On 29 November 2019, HMRC issued a notice of penalty assessment, under para. 3 of Schedule 55. This was the late filing penalty, and it was in the amount of £100. The penalty was issued to the address at 2D Drax Avenue. The Appellant has paid the late filing penalty.

19. As the return had not been delivered six months after the filing date, on 10 January 2020 HMRC issued a notice of penalty assessment under para. 5 of Schedule 55, in the amount of £300. The penalty was issued to the address at 2D Drax Avenue.

20. On 21 January 2020, the Appellant appealed against the Penalties. Following further exchanges of correspondence, HMRC issued their review conclusion on 15 February 2021, upholding the Penalties.

21. On 18 February 2021, the Appellant lodged an appeal with the Tribunal.

Q. Is the Appellant in default of an obligation imposed by statute?

22. ATED is a charge to tax on companies which own residential property in the United Kingdom. ATED was announced by the government in its budget statement of 21 March 2012. The purpose was to introduce an annual charge on residential properties valued in excess of £2,000,000.00; and purchased by non-natural persons (i.e., companies, partnerships or other

investment vehicles). This form of ownership is described as "*enveloping*". ATED returns are required if the property (a) is a dwelling; (b) is in the United Kingdom; (c) was valued at more than (i) £2 million (for returns from 2013-14 onwards); (ii) £1 million (for returns from 2015-16 onwards); and (iii) £500,000.00 (for returns from 2016-17 onwards); and (d) is owned completely, or partly, by a company. The valuation threshold for liability to ATED has, therefore, been adjusted to £500,000.00.

23. On 4 August 2013, guidance on ATED was published on the HMRC website. Following changes announced in the Budget on 19 March 2014, the guidance was updated on 20 March 2014. On 1 April 2015, new rules were introduced in respect of properties where full relief from ATED could be claimed, and for which ATED is not payable. The form required for this is the "*Relief Declaration Return*". Relief from ATED includes (a) property rental businesses; (b) property developers; (c) property traders; and (d) financial institutions acquiring dwellings in the course of lending.

24. The ATED legislation was introduced in FA 2013. Section 94 FA 2013 provides for the annual ATED tax charge, and s. 159 provides for the filing of an ATED return. Subsection 159(2) (*supra)* provides that a return under subsection (1) must be delivered by the end of the period of 30 days, beginning with the first day in the period on which the person is within the charge with respect to the interest. Schedules 33, 34 and 35 to FA 2013 came into force on 17 July 2013, and extended the penalty provisions under Schedules 55 and 56 to the ATED regime, with respect to the late filing of a return, and the late payment of ATED tax.

25. If a person fails to file a tax return by the "penalty date" (the day after the "filing date" i.e., the date by which a return is required to be made or delivered to HMRC), para. 3 of Schedule 55 provides that he is liable to a penalty of £100. Paragraph 19(2)(c) provides that any late filing penalty must be issued within two years of the due date for filing.

26. Paragraph 4 of Schedule 55 provides that a person is liable to a penalty under this paragraph if the failure continues after the end of the period of three months, beginning with the penalty date. Paragraph 4 (1) (c) of Schedule 55 however places an obligation on HMRC to specify the date from which the daily penalty was payable, and para. 18 provides that HMRC must (a) assess the penalty; (b) notify the taxpayer; and (c) state in the notice the period in respect of which the penalty is assessed.

27. The legislation is clear that a taxpayer is liable to a penalty under para. 4 of Schedule 55 if (and only if) the required notice has been given. For daily penalties to be validly imposed, HMRC have an additional burden to prove that the condition under para. 4(1)(c) is met. The Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761 ('*Donaldson*'), to a large extent, is about whether the onus has been met by HMRC in imposing the daily penalties. The appellate history in *Donaldson* sets out the development of the judicial interpretation of para. 4(1)(c). Where the burden is not met, the daily penalties are invalidated. Whilst daily penalties were issued in the appeal before me, these were withdrawn due to errors in the notice. This matter is, therefore, not in issue between the parties.

28. Paragraph 5 of Schedule 55 provides that a person is liable to a penalty under that paragraph if his failure continues after the end of the period of six months, beginning with the penalty date.

29. Having summarised the relevant legal provisions, I turn to consider the circumstances of this appeal on the question of the default that has occurred in this appeal:

30. I have found that the Appellant purchased the property on 3 July 2018. The return filed by the Appellant identified the first date in the period as being in July 2018. Therefore, under s. 159 FA 2013, the return was required to be submitted by 30 July 2018. The Appellant did not file the ATED return by this date. The ATED relief return for the 2019 tax year was submitted on 25 February 2019. This matter is also not in issue between the parties and the Appellant has, as stated, paid the late filing penalty. The ATED relief return should have been submitted by 30 July 2018. In accordance with s. 159 FA 2013, it was submitted 210 days late. The Appellant is, therefore, in default of an obligation imposed by statute.

31. The initial late filing penalty was issued on 29 November 2019, and the six-month penalty was issued on 10 January 2020. The penalties were, therefore, issued within the timeframe stipulated in para. 19(2)(c) of Schedule 55. Subject to considerations of 'reasonable excuse' and 'special circumstances' set out below, the Penalties imposed are due and have been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default that has occurred?

32. There is no statutory definition of 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test, and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Comrs* (2006) Sp C 548, at [18] ('*Rowland*').

33. Parliament has addressed the issue of the individual circumstances of the taxpayer by providing, at para. 23 of Schedule 55, that:

> "(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."

34. The test I adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

35. Although *Clean Car* was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

36. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word 'reasonable' imports the concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer.

37. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question, and having proper regard for their responsibilities under the Taxes Acts: *Collis v HMRC* [2011] UKFTT 588 (TC). The decision depends upon the particular circumstances in which the failure occurred. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

38. I proceed by firstly determining whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, I have assessed whether the facts put forward and any belief held by the Appellant are sufficient to amount to a reasonable excuse.

39. Firstly, it is submitted on behalf of the Appellant that HMRC's guidance was unclear, misleading and ambiguous, in respect of when the ATED relief return was due. Having considered the applicable law, and the guidance, I find that the Appellant's argument is without merit.

40. Section 2 of the ATED Returns Notice *"When to complete an ATED return"* explains the concept of a "chargeable period", as follows:

> *"2.1 The chargeable person, section 3 of the ATED technical guidance, must submit an ATED return for any property (single-dwelling interest) that's within the scope of ATED for the relevant chargeable period. An ATED chargeable period runs from 1 April to 31 March."*
>
> *There are reliefs available which may reduce the liability in part or to zero. However, all claims for relief shown in paragraph 9.17 must be made in a return."*

[Emphasis added both above and below]

41. Section 2.2 of the notice then explains the 30-day filing requirement in relation to the chargeable period:

> *"Normally an ATED return must be made within 30 days of the date on which the property first comes within the charge to ATED for any chargeable period – but read 2.7."*
>
> *Where a single-dwelling interest is held on the first day of the chargeable period, that is 1 April, the return must be filed by 30 April in the year of charge. For example, if the chargeable person owned a property by 1 April 2017, a return must be submitted by 30 April 2017."*

42. Section 2.6 (in relation to when an ATED return is due when a property is acquired part-way through a period) provides that:

> *"Where a property is acquired part way through a chargeable period, for example, a single-dwelling interest is brought from a third party, you must file an ATED return by the end of the period of 30 days beginning with the date of acquisition or transaction. Also read section 7 of this notice if you acquire a property which is eligible to a relief."*

43. Section 2.7 provides that:

> *"There are two 90-day filing dates provided for in the legislation. These are for 'new dwellings' and 'dwellings produced from other dwellings – see section 26 of the ATED technical guidance…"*

44. Section 11 of the notice includes a summary of ATED return filing and payment dates.

45. The section covering ATED on HMRC's website also provides for the following:

> *"Normally you need to submit your return:*
>
> - *by 30 April if your property is within the scope of ATED on 1 April*
> - *within 30 days of acquisition if your property comes within the scope of ATED after 1 April*
> - *for a newly built property, within 90 days of the earliest of the date:*
>
> - *your property becomes a dwelling for Council Tax purposes*
> - *it is first occupied."*

46. I am satisfied that the guidance is not unambiguous. Furthermore, where tax is charged, a person may claim interim relief before the end of the chargeable period. Where relief is claimed, a return must be filed.

47. I bear in mind that the guidance is not an exhaustive code, or a comprehensive edict. It is trite law that guidance and kindred instruments do not have the status of law and, thus, are subservient to primary legislation and secondary legislation.

48. The legislation, however, sits well with the guidance. By s. 159 FA 2013, there is an obligation to file a tax return and the 'filing date' is specified. An ATED return is due for each year in advance by 30 April for the fiscal year ending 31 March following, except for the first ATED return, which is due 30 days after the date of purchase of the property.

49. I find that whilst the Appellant may have honestly believed that the ATED relief return was required by 1 April, having accessed the guidance and having failed to contact HMRC to seek any clarification that was required, in my judgment the Appellant's actions were not objectively reasonable.

50. Secondly, it is submitted on behalf of the Appellant that at no point did the Appellant's legal advisers inform the Appellant that a return was required. The notice of appeal however shows an awareness of the applicability of ATED:

> *"…We were aware that ATED filings were required…"*

51. Indeed, the Appellant paid the late filing penalty of £100.

52. I find that although the Appellant may well have relied upon getting tax advice from legal advisers, that does not absolve the Appellant from the personal responsibility of ensuring that obligations are met. I find that even if the Appellant placed reliance upon the legal advisers, in *Muhammed Hafiz Katib v HMRC* [2019] UKUT 189 (TCC) ('*Katib*'), the Upper Tribunal held the following, in the context of a late appeal, at [50]:

> "Failings by a litigant's adviser are, for the purposes of an application for permission to appeal late, to be regarded as failings of the litigant."

53. The Upper Tribunal concluded that the adviser's failings did not provide a good reason for the serious and significant delay. The Upper Tribunal further concluded that the lack of experience of the appellant, and the hardship that is likely to be suffered, was not sufficient to displace the responsibility on the appellant to adhere to time-limits. The differences in fact in *Katib* and the appeal before me do not negate the principle established in relation to the need for statutory time-limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

54. The 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 taxpayer concerned, and not upon his or her legal adviser. The purpose of the legislation would be defeated if a penalty could be avoided by placing the obligation on an adviser. I find that there is considerable force in HMRC's submission that it is not clear why the Appellant expected to get tax advice from its legal advisor.

55. I have borne in mind the comments of the tribunal in *Hesketh & Anor v HMRC* [2018] TC 06266. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The fact that the Appellant may not have been aware of the duties in relation to ATED, and the filing deadlines, does not constitute a reasonable excuse. The onus is upon an appellant to ensure that they properly understand their obligations under the law.

56. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [8], Judge Mosedale said this:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

57. As held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

58. It is, therefore, trite law that ignorance of the law cannot come to the defence of a violation of the law.

59. Thirdly, following the initial failure to file, the first filing penalty notice was sent to the Appellant on 29 November 2019. Whilst the Appellant had already paid the initial late filing penalty, and whilst the Appellant filed the ATED relief return on 25 February 2019, that was already after the statutory deadline. The legislation makes clear provision for the penalties chargeable under Schedule 55. The Appellant's ATED relief return was already 210 days late at the time that it was submitted. The Appellant became liable to ATED as soon as it acquired the dwelling (property), and the return should have been filed within 30 days, which was 30 July 2018.

60. Fourthly, it is submitted on behalf of the Appellant that HMRC did not send a letter regarding the return. I am satisfied, however, that the legislation places no obligation on HMRC to issue notice in respect of an ATED relief return.

61. I have considered the case of *Revenue & Customs Comrs v Hok Ltd* [2013] STC 255 ('*Hok*'). There, the Upper Tribunal held that the First-tier Tribunal ('FtT') did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v Revenue & Customs Commissioners* [2014] UKFTT 657 (TC), the tribunal held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Tribunal found, at [116], that the jurisdiction of the tribunal in cases of that nature was limited to considering the application of the tax provisions themselves.

62. Having considered the Appellant's submissions, cumulatively, I hold that the Appellant does not have a reasonable excuse for the late filing of the ATED relief return.

Q. Do any Special Circumstances apply?

63. The amount of the penalties is set within the legislation. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate.

64. Where a person appeals against the amount of a penalty, para. 22(2) and (3) of Schedule 55 provide the tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. There have been a number of cases on special circumstances, from which I derive the following principles:

(1) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152).

(2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(5) The special circumstances must apply to the individual and not be general circumstances that apply to many taxpayers: *Collis*, at [40] and *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 95.

65. The Tribunal may, therefore, rely on para. 16 (Special Reduction), but only if HMRC's decision was 'flawed' when considered in the light of the principles applicable in proceedings for judicial review'. That is a high test.

66. HMRC have considered the Appellant's grounds of appeal found that the Appellant's circumstances do not amount to special circumstances which would merit a reduction of the Penalties. Accordingly, HMRC's decision not to reduce the Penalties was not flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the Penalties imposed upon the Appellant. I have considered the grounds of appeal in their entirety, paying due regard to the separate arguments submitted on behalf of the Appellant. I hold that no special circumstances apply.

67. Lastly, the Appellant submits that no tax liability was due. In *Edwards v R &C Commrs* [2019] BTC 516, 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.

68. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

69. For the reasons set out above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 15 AUGUST 2022