Neutral Citation: [2023] UKFTT 00453 (TC)

Case Number: TC08829

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/11749

ANNUAL TAX ON ENVELOPED DWELLINGS ("ATED") – whether ATED return filed late – yes – whether reasonable excuse established – no – whether special circumstances – no – appeal dismissed

Heard on: 12 May 2023
Judgment date: 25 May 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER ANN CHRISTIAN

Between

HUGHES PROPERTY PARTNERS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jay Shah of Financial Partnership Limited

For the Respondents: Ms Kelly Clark, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against late filing penalties charged under Schedule 55 to the Finance Act 2009 ("Schedule 55") in respect of the late filing of an annual tax on enveloped dwellings ("ATED") return. We have set out the relevant statutory provisions for ATED at Appendix 1 and for penalties at Appendix 2.

2. The penalties that are the subject matter of this appeal are a £900 daily late filing penalty under paragraph 4 of Schedule 55 imposed on 2 June 2022 in respect of the tax year 31 March 2021 and a £300 six month late filing penalty imposed under paragraph 5 of Schedule 55 on 2 June 2022 in respect of the same year.

3. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system.

4. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

5. We had a hearing bundle extending to 249 pages, a legislation and authorities bundle extending to166 pages and a Statement of Reason for the respondents extending to 22 pages. We heard oral submissions from both parties and, in Mr Shah's case that included some expansion of the known facts.

Summary of the law

6. The ATED legislation was introduced in the Finance Act 2013 ("FA 13"). It is an annual tax charge on UK residential properties valued at over £500,000 which are held by companies, partnerships or collective investment schemes. In some cases an exemption from the charge is available but a return still has to be made in order to claim the exemption.

7. The appellant is a property developer and would therefore be entitled to an exemption. All claims for relief must be made in an ATED return or an amendment to such a return. In terms of section 159A FA 13, where a claim to relief reduces the charge to nil, the claim may be made in a shorter type of ATED return called a Relief Declaration Return.

The facts

8. There was no dispute between the parties as to the facts of the case.

9. The filing date for the ATED relief return for the year ending 31 March 2021 was 16 September 2020 following the purchase of a property in August 2020.

10. In August or September 2020, because it was the first time that the appellant's agent had encountered ATED, the agent telephoned HMRC for guidance. Mr Shah said that HMRC had told them that they were working from home, were very busy and were unable to give advice. He said that they were told that a return had to be filed a year in advance.

11. Neither he nor his colleague could recall if they had looked at the HMRC website. They too were working from home. Neither the appellant's agent nor HMRC can trace any note of any telephone calls.

12. The relevant return was filed on 12 May 2021.

13. On 8 April 2022, HMRC issued a £100 late filing penalty under paragraph 3 of Schedule 55. That letter stated that the penalty should be paid within 30 days. It also intimated that daily penalties would be imposed from 17 December 2020.

14. On 2 June 2022, HMRC issued a Notice of Penalty Assessment including both of the assessments which are now the subject matter of the appeal.

15. On 10 June 2022, the appellant's accountants wrote to HMRC referring to a telephone call and appealing the penalties on the basis of what were described as exceptional circumstances, namely:-

(a) The property in question was purchased on 18 August 2020 and no request was made to file an ATED return. It was suggested that the accountant had tried "to chase HMRC" but had had no response.

(b) The ATED return was filed by them on the first available opportunity on 12 May 2021 having received a letter from HMRC requesting that an ATED return be filed for a different property purchased by the appellant. The original property was then included in that return.

(c) There had been enormous pressure on accounting firms during the Covid-19 pandemic because of furlough claims etc and it was difficult to keep in touch with HMRC who were not working in offices.

(d) There was no loss of tax by HMRC on any of the ATED returns as the tax liability was nil.

16. On 29 June 2022, HMRC responded stating that they declined to cancel the penalty because no reasonable excuse had been intimated and there were no special circumstances.

17. HMRC explained that there was no requirement for HMRC to give notice to a taxpayer to file an ATED return. It was pointed out that all returns are due within 30 days of the first day in a period that there is liability to ATED regardless of whether tax is due.

18. On 4 July 2022, the appellant's agent lodged an appeal with the Tribunal. The Grounds of Appeal are that:-

(a) HMRC did not issue a notice to the appellant notifying them of their obligation to file an ATED return. HMRC's practice in that regard is inconsistent as the appellant did receive a Notice to File for other properties.

(b) The appellant telephoned HMRC on multiple occasions but did not receive any updates or call-backs.

(c) The return was a relief return so there was no tax due. The penalty of £1,200 is not justifiable for a nil return.

(d) The late filing is not deliberate.

(e) Covid-19 should be classified as an exceptional circumstances because of its nature and the disruption caused.

(f) The appellant has no history of being late or non-compliant with their HMRC obligations.

Discussion

19. The responsibility for filing an ATED return on time rests squarely with the taxpayer. In contrast to many 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 arising until it is informed by a taxpayer.

20. However, HMRC is still required to show that the penalty notices were correctly issued.

21. The initial filing penalty and the six month penalty arrived automatically and there is no doubt that the return was filed late. There does not appear to have been an appeal against the

original late filing penalty. In any event it is not part of this appeal. The daily penalty, which applies where the return is more than three months late, is subject to HMRC's discretion. They have chosen to apply it.

22. HMRC rightly relied upon the decision of the Upper Tribunal in *Priory London Limited and another v HMRC* [2022] UKUT 225 (TCC) in arguing that the penalties, including the daily penalties, had been timeously and competently raised in terms of Schedule 55. They were.

Reasonable excuse

23. A taxpayer escapes liability for a penalty under Schedule 55 if HMRC or the Tribunal is satisfied that there is a reasonable excuse for the failure and the failure is remedied without unreasonable delay after the excuse ceased. Reliance by the taxpayer or any other person to do anything is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

24. The narrative presented to us was entirely predicated on the appellant's agent's problems which were primarily lack of knowledge of ATED law and Covid-19 pressures.

25. HMRC did not address that in their Statement of Reason but, of course, as we explained in the hearing, we are bound by the decision of the Upper Tribunal in *HMRC v Katib* [2019] UKUT 189 (TCC). Albeit that dealt with the different issue of a late appeal, in summary, the Upper Tribunal found that reliance on an accountant who fails the taxpayer cannot assist where a statutory time limit is missed. At paragraph 58 the Upper Tribunal stated unequivocally that:-

> "It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise."

The Upper Tribunal went on to find at paragraph 59 that:-

> "…We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result…".

26. Whilst we certainly accept that at all times both the appellant and the appellant's agent have acted in good faith, nevertheless the reasons advanced for the late filing do not amount to a reasonable excuse. HMRC's website provides clear and extensive information as to when and how an ATED return must be filed.

27. The fact that the appellant has a good compliance record both before and after this failure to file timeously cannot assist. The Tribunal is concerned solely with this failure.

Special circumstances

28. If HMRC think it is right to do so because of special circumstances they may reduce the penalty. They have not done so in this case. 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 the appellant's agent was not aware of the obligation to file a return within 30 days or from the fact that it promptly complied once aware of that obligation.

29. Mr Shah vigorously argued that Covid-19 was a special circumstance as it was exceptional. Whilst, of course, we accept that it, and lockdown, were exceptional, but to justify

a special reduction there would have be a clear *nexus* or connection between Covid-19 and the failure to file the return until 238 days had elapsed. We accept that the appellant's agents had been busy, as Mr Shah said, "assisting" clients with furlough claims and trying to help everyone etc, that cannot be a special circumstance in relation to the ATED return. That was effectively prioritising those issues rather than finding out the law on ATED returns. The decision in regard to special reduction was not flawed.

Proportionality

30. The appellant has argued that the penalties charged are disproportionate. This argument was addressed in *Barry Edwards* v *HMRC* [2019] UKUT 137 (TCC). 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.

31. 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 the appellant acted swiftly when it realised its obligations.

32. As we indicated in the course of the hearing we have no power to reduce the penalties on the basis of some more generalised claim of unfairness as was made clear by the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC) when it said at paragraph 36 that the First-tier Tribunal

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

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

DECISION

34. For all these reasons we have therefore decided that the appellant's appeal is dismissed and the penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25th May 2023

Appendix 1

Finance Act 2013

94 Charge to tax

(1) A tax (called "annual tax on enveloped dwellings") is to be charged in accordance with this Part.

(2) Tax is charged in respect of a chargeable interest if on one ormore days in a chargeable period—

(a) the interest is a single-dwelling interest and has a taxable value of more than £500,000, and

(b) a company, partnership or collective investment scheme meets the ownership condition with respect to the interest.

(3) The tax is charged for the chargeable period concerned.

(4) A company meets the ownership condition with respect to a single-dwelling interest on any day on which the company is entitled to the interest (otherwise than as a member of a partnership or for the purposes of a collective investment scheme).

…

(8) The chargeable periods are—

(a) the period beginning with 1 April l2013 and ending with 31 March 2014, and

(b) each subsequent period of 12 months beginning with 1 April.

(9) See also section 95.

159 Annual tax on enveloped dwellings return

(1) ..

(2) A return under subsection (1) must be delivered by the end of the period of 30 days beginning with 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—

(c) 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

(d) 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".

159A Relief declaration returns

(5) "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.

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

(7) 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).

(8) 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.

(9) 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.

(10) 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.

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

(12) For the purposes of subsection (6)(b), the "relevant conditions" are the same as the conditions in subsection (4) to the day of the claim are to be read as references to day S.

(13) This table sets out the numbered types of relief to which the provisions specified in the left hand column relate—

…

Provisions	**Type of relief to which it relates**
…	
Section 138 or 139 (property developers)	3

(14) Where a person—

(a) has failed to make annual tax on enveloped dwellings returns in respect of two or more single-dwelling interests, and

(b) could have discharged the duties in question by making a single relief declaration return in respect of all the interests,

the failure may be taken, for the purposes of Schedule 55 to FA 2009, to be a failure to make a single annual tax on enveloped dwellings return.

(15) In this section—

- “pre-claim period” has the same meaning as in section 100;
- “taxable day”, in relation to a person and a single-dwelling interest, means a day on which the person is within the charge with respect to the interest, other than a day which is relievable in relation to the interest.

APPENDIX 2

Penalties - RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 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).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 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.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

> 6—
>
> (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 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

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

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 100%,

(b) for the withholding of category 2 information, 150%, and

(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

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

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 70%,

(b) for the withholding of category 2 information, 105%, and

(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (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.

(6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

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.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

> 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) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

> 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.