[2020] UKFTT 0003 (TC)

TC07511

Land Transaction Tax – Late appeal against decision of Welsh Revenue Authority – Late Filing Penalty – Whether appeal should be admitted after the relevant period – Whether reasonable excuse on the facts

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04650

BETWEEN

ALEXANDRA WINFIELD **Appellant**

-and-

WELSH REVENUE AUTHORITY **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

The Tribunal determined the appeal on 2 January 2020 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 dated 8 July 2019 (with enclosures) and the Welsh Revenue Authority's Statement of Case (with enclosures) acknowledged by the Tribunal on 22 October 2019.

DECISION

INTRODUCTION

1. On 1 April 2018, in accordance with the Government of Wales Act 2006 (as amended by the Wales Act 2014), land transaction tax ("LTT") and landfill disposal tax became the first specifically Welsh taxes to come into effect for over 800 years. They replaced stamp duty land tax ("SDLT") and landfill tax which continue to apply in England but no longer in Wales. The collection and management of these devolved taxes is the responsibility of the Welsh Revenue Authority ("WRA") established under s 2 of the Tax Collection and Management (Wales) Act 2016 ("TCMA").

2. This appeal, which concerns a penalty, in the sum of £300, for the failure to file a LTT return within six months of a "notifiable transaction", is the first appeal against a decision of the WRA to come before the Tribunal. It is therefore necessary to first set out the LTT provisions applicable to this case, contained in the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 ("LTTA"), in rather more detail than would otherwise be the case for an appeal of this type.

RELEVANT LEGISLATION

3. Section 2 LTTA provides:

> **2 Land transaction tax**
>
> (1) A tax (to be known as "land transaction tax") is to be charged on land transactions.
>
> (2) The tax is chargeable—
>
> (a) whether or not there is an instrument effecting the transaction,
>
> (b) if there is such an instrument, regardless of where it is executed, and
>
> (c) regardless of where any party to the transaction is or is resident.
>
> (3) The Welsh Revenue Authority ("WRA") is to be responsible for the collection and management of the tax.

4. A "land transaction" is defined by s 3(1) LTTA as, "an acquisition of a chargeable interest". Section 4 LTTA provides that a "chargeable interest" is:

> (1) A chargeable interest is—
>
> (a) an estate, interest, right or power in or over land in Wales, or
>
> (b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power,
>
> …
>
> (2) In this Act, "land in Wales" does not include land below mean low water mark.

5. Sections 44 and 45 LTTA provide:

> **44 Duty to make a return**
>
> (1) The buyer in a notifiable land transaction must make a return to WRA.
>
> (2) A return made under this section must—
>
> (a) be made before the end of the period of 30 days beginning with the day after the effective date of the transaction, and

(b) if the transaction is a chargeable transaction, include a self-assessment.

(3) In this Act, "self-assessment" in relation to a return, means an assessment of the amount of tax that, on the basis of the information contained in that return, is chargeable in respect of the transaction.

45 Notifiable transactions

(1) For the purposes of this Act, a land transaction is notifiable if it is—

(a) an acquisition of a major interest in land (see section 68) that does not fall within one of the exceptions listed in section 46,

(b) an acquisition of a chargeable interest, other than a major interest in land, if—

(i) it is not exempt from charge as provided for in Schedule 3, and

(ii) tax is chargeable at a rate of more than 0%, or would be so chargeable but for a relief listed in section 30, in respect of any part of the chargeable consideration for the transaction,

(c) a land transaction that a person is treated as entering into by virtue of section 11(3)(contract providing for transfer to third party), or

(d) a notional or additional notional land transaction within the meaning given in paragraph 8(1) and (3) of Schedule 2.

(2) …

Although s 45(1)(a) LTT refers to exceptions listed in s 46 LTT, none of the exceptions listed in that section are applicable in the present case.

6. Section 68 LTTA provides:

References in this Act to a "major interest" in land are to—

(a) an estate in fee simple absolute [ie freehold], or

(b) a term of years absolute,

whether subsisting at law or in equity.

7. The effective date of a transaction is defined by s 71 LTTA which provides:

Except as otherwise provided, the effective date of a land transaction for the purposes of this Act is the date of completion.

8. Provisions for penalties for the failure to file a LTT return as required by s 44 LTTA are contained in Chapter 2 of the TCMA of which s 119 TCMA is relevant to the present case. This provides:

119 Penalty for failure to make tax return within 6 months from filing date

(1) A person who is required to make a tax return is liable to a penalty if the person's failure to make a tax return continues after the end of the period of 6 months beginning with the day after the filing date.

(2) The penalty is the greater of—

(a) 5% of the amount of the devolved tax to which the person would have been liable if the tax return had been made, and

(b) £300

9. For the purposes of the TCMA a "tax return" is a return "relating to a devolved tax". This includes LTT (see s 192(2) TCMA). For LTT purposes, the "filing date" is defined by s 40 TCMA as "the day by which the return is required to be made under the LTTA", ie within 30 days of the effective date of the transaction (see s 44(2)(a) LTTA, above)

10. Sections 127 and 128 TCMA (insofar as applicable to the present case) provide:

> **127 Assessment of penalties under Chapter 2**
>
> (1) Where a person becomes liable to a penalty under this Chapter, WRA must—
>
> (a) assess the penalty,
>
> (b) issue notice to the person of the penalty assessed, and
>
> (c) state in the notice the period, transaction or amount in respect of which the penalty has been assessed.
>
> (2) An assessment of a penalty under this Chapter may be combined with an assessment to a devolved tax.
>
> (3) A supplementary assessment may be made in respect of a penalty under section 119 or 120 if an earlier assessment operated by reference to an underestimate of the amount of devolved tax to which a person would have been liable if a tax return had been made.
>
> …
>
> **128 Time limit for assessment of penalties under Chapter 2**
>
> (1) An assessment of a penalty under this Chapter 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—
>
> (a) in the case of failure to make a tax return, the filing date, …
>
> (3) Date B is the last day of the period of 12 months beginning with—
>
> (a) in the case of a failure to make a tax return—
>
> (i) the end of the appeal period for the assessment of the amount of devolved tax to which a person would have been liable if the tax return had been made, or
>
> (ii) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil; …
>
> …
>
> (5) In subsection (3), "appeal period" means—
>
> (a) if no appeal is made, the period during which an appeal could be made, and
>
> (b) if an appeal is made, the period ending with its final determination or withdrawal

11. However, a person is not liable to a penalty if he or she has a reasonable excuse for the failure to file a return. Insofar as material to the present case s 126 TCMA provides:

> (1) If a person satisfies WRA or (on appeal) the tribunal that there is a reasonable excuse for a failure to make a tax return, the person is not liable to a penalty under sections 118 to 120 in relation to the failure.
>
> …
>
> (3) For the purposes of subsections (1) … —
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control;
>
> (b) where a person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure;
>
> (c) where a person had a reasonable excuse for the failure but the excuse has 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.

12. A decision by the WRA to issue a penalty relating to a devolved tax is an "appealable decision" under s 172(2)(d) TCMA. A taxpayer who has received such an appealable decision by way of notification of a penalty may either request the WRA to review its decision to issue a penalty in accordance with s 173 (2) TCMA or appeal to the Tax Chamber of the First-tier Tribunal (the "Tribunal" or "FTT") under s 178 TCMA. An appeal to the Tribunal can be made either on receipt of the penalty notification or at the conclusion of a review.

13. Section 179 TCMA provides:

> (1) An appeal must be made to the tribunal before the end of the relevant period.
>
> (2) Subject to subsections (3) and (4), the relevant period is—
>
> …
>
> (b) where the appeal relates to a decision of any other kind, the period of 30 days beginning with the day on which WRA issues the notice informing the appellant of the decision.
>
> (3) Subject to subsection (4), where WRA has reviewed the decision to which the appeal relates, the relevant period is the period of 30 days beginning with the day on which notice is issued to the appellant under section 176(5), (6) or (7) in relation to the review.
>
> …

14. Under s 180 TCMA an appeal may be made to the Tribunal "after the relevant period if the tribunal gives permission."

15. Section 181 TCMA provides:

> (1) If an appeal against an appealable decision is made to the tribunal in accordance with section 179 or 180 (and not withdrawn), the tribunal must determine the appeal.
>
> (2) The tribunal may determine that the appealable decision is to be—
>
> (a) affirmed,
>
> (b) varied, or
>
> (c) cancelled.

16. On receipt an appeal will be acknowledged by the Tribunal and a direction made, under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 allocating the appeal to a category. The present case was allocated to the default paper category of appeal, to be determined without a hearing, in accordance with a Tribunal direction of 28 August 2019.

FACTS

17. On 7 May 2019 Ruben Lewis O'Brien LLP, solicitors, filed an online LTT return on behalf of Ms Alexandra Winfield. The return stated that she had bought a bought a freehold property in Torfaen for £90,000 and recorded the date of the contract as 15 June 2018 and the effective date of the transaction as 15 August 2018.

18. As the return was filed more than six months after the effective date of the transaction, the WRA notified Ms Winfield, by letter dated 8 May 2019, that she had been assessed to a penalty in the sum of £300 which was due to be paid by 7 June 2019. Ms Winfield requested a review of the penalty assessment decision on 15 May 2019. A review was undertaken by the WRA which upheld the penalty on the grounds that Ms Winfield did not have a reasonable excuse for the failure to file the LTT return on time. Ms Winfield was notified of the outcome of the review by letter dated 6 June 2019.

19. On 8 July 2019, 32 days after being notified of the outcome of the review, Ms Winfield completed and sent an online Notice of Appeal to the Tribunal. At the same time she applied for permission for the appeal to be brought out of time.

20. In her Notice of Appeal to the Tribunal Ms Winfield states that she had instructed solicitors, Keith Smart & Co, in relation to the purchase of the Property and relied on them to submit the LTT return to the WRA. However, in July 2018 she had received a letter from the Solicitors Regulation Authority informing her that it had intervened into (ie closed) the firm on 27 June 2018.

21. The Notice of Appeal continues:

> "I understand NOW that it is down to the individual to make sure the [LTT] fee is paid on time but at the time I was a first time buyer and I appointed a solicitor to do all the proceeds and act on my behalf when I purchased my property [the Property]. I did not know that I had to pay [LTT], regardless if I did not know then it would have been too late as it had gone over the 30 days when I received notification that Keith Smart had closed down.
>
> The letter attached from the [WRA, dated 6 June 2019] states that their review has been completed and their conclusion they reached is not a reasonable excuse on my behalf that my appointed solicitor failed.
>
> If I appoint a solicitor I expect them to carry out all the relevant things that have to be done when purchasing a property.
>
> The solicitor failed to do this and I was not aware [that a LTT return had not been filed] until the 30 days had passed by which time I was pushed into a corner. I have been fighting this case with the Solicitors Regulation Authority for the past year which has caused me a substantial amount of stress.
>
> …
>
> I wish to appeal this decision [of the WRA]. I am not in a financial way able to afford this penalty due to a reduction of hours in my current occupation due to stress.

> Please could this be looked at as a simple indirect misunderstanding on my behalf and if I had known at the time all the rules and procedure of purchasing a property I would have made sure that the [LTT] was made and on time."

DISCUSSION

22. It is clear from the information provided in the LTT return filed by her solicitors that Ms Winfield, in buying the Property acquired a chargeable interest in or over land in Wales. As she bought the freehold of the Property (a major interest in land under s 68 LTTA) the purchase was a notifiable transaction under s 45 LTTA. She should, therefore, have made a LTT return to the WRA in accordance with s 44 LTTA within 30 days of the effective date of the transaction, ie by 14 September 2018 (as the effective date of the transaction shown on the LTT return was 15 August 2018). However, she did not make a LTT return until 7 May 2019, more than six months after the 14 September 2019 filing date.

23. It is also clear that the WRA assessed Ms Winfield to a penalty and notified her of this within two years of the filing date in accordance with ss 127 and 128 TCMA. Therefore, unless she can establish that she had a reasonable excuse for the failure to file the LTT return on time Ms Winfield will be liable a penalty of £300 under s 119 TCMA.

24. However, as Ms Winford notified the Tribunal more than 30 days from the issue of the penalty notice as required by s 179 TCMA, before I consider whether Ms Winfield did have a reasonable excuse, I should first determine whether permission should be granted under s 180 TCMA to allow the appeal to be made after the relevant 30 day period even though the WRA do not object to the appeal being admitted.

25. The following guidance on the how to approach this issue was given by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC):

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected … The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

26. In the present case the delay was two days which is neither serious nor significant. However, it is still necessary to consider the reason why the appeal was not made in time and "all the circumstances of the case".

27. In an email to the Tribunal, dated 30 July 2019, Ms Winfield wrote:

> "I have been asked to answer why my appeal was sent in late.
>
> Unfortunately I cannot give a specific reason for this, this has been going on for over a year and has caused me substantial stress, I have dealt with letters and emails back and forth on a number of occasions.
>
> I do apologise for my late filing to the tribunal but as stated I cannot give a reason why my appeal was sent in late.
>
> Please could this still be considered for appeal, I would just like this matter to be dealt with and closed so I can eliminate the stress levels."

28. It is clear from *Martland* that the starting point is that permission to appeal after the "relevant period" should not be granted unless I am satisfied that, on balance, it should.

29. However, I am not satisfied that I should depart from the starting point in the present case. This is because of the complete absence of any reason or explanation for not making the appeal in time notwithstanding the clear reference to the 30 day time limit in the WRA's letter of 6 June 2019 notifying Ms Winfield of the outcome of the review and her appeal rights. Although, taking account all the circumstances of the case, I accept that there is possible prejudice to Ms Winfield in not admitting her appeal I have nevertheless come to the conclusion that permission to make an appeal after the relevant period must be refused.

30. I find support for such a strict approach to time limits from *BPP Holdings Limited v HMRC* [2017] UKSC 55 in which the Supreme Court endorsed the guidance given by Judge Sinfield in the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Limited* [2014] STC 973 in relation to the different rules applicable in the courts (the civil procedure rules or CPR) and the tribunal procedure rules and the strict approach adopted by the courts, in the following terms:

> "25. …he [Judge Sinfield] accepted that "the CPR do not apply to tribunals" but added that he did not "accept that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR". The same view was expressed by Ryder LJ in paras 37 and 38 in the Court of Appeal in this case, including this: "I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals", and added that "[i]t should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's".
>
> 26. It is not for this Court to interfere with the guidance given by the UT and the Court of Appeal as to the proper approach to be adopted by the Ft-T in relation to the lifting or imposing of sanctions for failure to comply with time limits (save in the very unlikely event of such guidance being wrong in law). We have twice recently affirmed a similar proposition in relation to the Court of Appeal's role in relation to the proper approach to be taken in such cases by first instance judges - see *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 and *Thevarajah v Riordan* [2016] 1 WLR 76. The guidance given by Judge Sinfield in *McCarthy & Stone* was appropriate: as Mr Grodzinski QC, who appeared for BPP pointed out, it is "an important function" of the UT to develop guidance so as to achieve consistency in the Ft-T: see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48, para 41, per Lord Carnwath. And, by confirming that guidance in

> this case, the Senior President, with the support of Moore-Bick V-P and Richards LJ, has very substantially reinforced its authority. **In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach**. (emphasis added).

31. I would also add that *BPP Holdings v HMRC* concerned compliance with a direction of the Tribunal whereas the requirement to bring an appeal against a decision of the WRA "before the end of the relevant period" is a statutory obligation under s 179 TCMA.

32. Although not strictly necessary, given the effect of my decision not to give permission for the appeal to be made out of time means that there is no appeal to be determined by the Tribunal, as this is the first case against a decision of the WRA to come before the Tribunal, and as it has been addressed by the WRA in its statement of case, I have also considered whether, if permission been given, Ms Winfield had a reasonable excuse for failing to file her LTT return on time.

33. Other than exclude an insufficiency of funds or reliance on another person from amounting to a reasonable excuse, s 179 TCMA does not define a reasonable excuse which "is a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

34. Guidance on the approach to be taken by the Tribunal when considering a reasonable excuse was given by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) at [70] which was:

> "… to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with."

35. The Upper Tribunal continued at [71]:

> "In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

36. It would appear from her Notice of Appeal (see paragraphs 21 and 22, above) that the matters advanced by Ms Winfield as a amounting to reasonable excuse are:

(1) her reliance on her solicitor to file the LTT return on her behalf;

(2) her lack of knowledge that she was liable to LTT and required to make a return to the WRA;

(3) that she is unable to afford the penalty; and

(4) that she is suffering from stress.

37. In *Browne v HMRC* [2010] UKFTT 496 (TC) a taxpayer who had relied on her solicitors to file a SDLT land transaction return was found to have a reasonable excuse for failing to do

so in time because the firm was closed (intervened into) by the Solicitors Regulation Authority. However, that appeal succeed because the relevant legislation, s 77(2) of the Finance Act 2003, did not preclude reliance on a third party from being a reasonable excuse. As such, it was concluded, at [18], that, "in the absence of a specific provision to the contrary, reliance on a third party can amount to a reasonable excuse in cases such as this."

38. However, in the present case there is a specific provision, s 126 TCMA, which precludes reliance on another person from being a reasonable excuse unless the first person, "took reasonable care to avoid the failure". While I consider that it was not unreasonable for Ms Winfield to have instructed a solicitor to file her LTT as part of the conveyancing process she was told in July 2018 that the solicitor she had instructed had been closed by the Solicitors Regulation Authority on 27 June 2018.

39. Although this was after the date of the contract, 15 June 2018, it was before the date of completion, 15 August 2018, the effective date of the transaction for LTT purposes. As Ms Winfield knew that her solicitors had been closed by the Solicitors Regulation Authority before the date from which an LTT was required, any reliance on those solicitors to file the return after that date cannot, in my judgment, objectively amount to a reasonable excuse for the default.

40. Turning to Ms Winfield's lack of knowledge that she was liable to LTT, as the Upper Tribunal said in *Perrin v HMRC* at [82]:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case 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."

41. In *Neal v Customs and Excise Commissioners* [1988] STC 131 Simon Brown J, who dismissed an appeal of an appellant who had argued that she had a reasonable excuse for failing to register for VAT on the basis of her total ignorance of the law, observed, at 136, that:

> "It seems to me essential to recognise a distinction between on the one hand basic ignorance of the primary law governing value added tax including the liability to register and on the other hand ignorance of aspects of law which less directly impinge upon such liability."

42. In my judgment the requirement to file a LTT return on time falls within the first category identified by Simon Brown J, a primary obligation for which ignorance cannot be a reasonable excuse. Ms Winfield's appeal cannot therefore succeed on the basis of her lack of knowledge that a LTT return was required.

43. Although Ms Winfield says that she cannot afford to pay the penalty I agree with the WRA, as stated in its statement of case, that for this be a reasonable excuse the inability to pay would need to relate to the underlying failure to make the LTT return rather than an inability to pay the penalty. Moreover, even if this were not the case s 126(3)(a) TCMA precludes an insufficiency of funds from being a reasonable excuse.

44. While it is possible in certain circumstance for stress to amount to a reasonable excuse to be able to ascertain whether this is the case it is necessary to support any such assertion with evidence in support. For example medical evidence could be provided identifying the medical attendant with details of his or her familiarity with the appellant's medical condition (detailing all recent consultations), and identifying with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevented him or her from filing a return in accordance with the legislative requirements.

45. In the absence in this case of anything other than an assertion by Ms Winfield that there has "been a reduction of hours due to stress" I am unable to find that this can amount to a reasonable excuse.

46. Therefore, for the above reasons, even I had granted Ms Winfield permission to make an out of time appeal under s 180 TCMA that appeal would not have succeeded as, on the facts, Ms Winfield did not a reasonable excuse for failing to file her LTT return on time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 03 JANUARY 2020