



TC07961

Appeal number: TC/2020/01844

Annual Tax on Enveloped Dwellings (ATED) - Schedule 55 Finance Act 2009 - fixed and daily penalties for late filing of ATED return - appellant unaware of need to file return - whether reasonable excuse - no - whether notice validly given by HMRC of daily penalties under s4(1)(c) - no - appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

D & G THAMES DITTON LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

The Tribunal determined the appeal on 24 August 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 Appellant's Notice of Appeal dated 22 June 2020, and HMRC's Statement of Case dated 23 June 2020.

DECISION

1. This is an appeal by D & G Thames Ditton Limited (“the appellant”) against late filing penalties charged by the Respondents (“HMRC”), under Schedule 55 to the Finance Act 2009 (“Sch. 55 FA 2009”) in respect of the late filing of an Annual Tax on Enveloped Dwellings return.

Legislation and penalties

2. The Annual Tax on Enveloped Dwellings (“ATED”) is a tax charged on ‘non-natural persons’ (a company, a partnership with a company member, or a collective investment scheme) which hold an interest in one or more UK residential dwelling(s) known as (a ‘single-dwelling interest’) where that single dwelling interest is worth more than £500,000. It does not apply where an individual alone, or with other individuals, owns a residential property.

3. ATED is an annual tax and is charged in respect of ‘chargeable periods’ running from 1 April to 31 March.

4. The filing date for an ATED relief return is determined by s 159 FA 2013. This states that a return must be delivered by the end of 30 days beginning with first day in the period on which the person is within the charge with respect to the interest.

5. There are no statutory requirements within the Finance Act 2013 (“FA 2013”) which require HMRC to give notice to the taxpayer to file an ATED relief return.

6. A late filing penalty is chargeable where a taxpayer is late in filing their ATED return. The ‘penalty date’ is defined at Paragraph 1(4) Sch. 55 FA 2009 and is the date after the filing date.

7. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Sch. 55 FA 2009 for the late filing of the Individual Tax Return.
- ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Sch. 55 FA 2009.
- iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Sch. 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Sch. 55 FA 2009.

8. Penalties of £100, £900 and £300 were imposed, under (i) (ii) and (iii) above.
9. The appellant's appeal is against all the penalties.

Factual background

10. The appellant was incorporated as a private limited company on 28 August 2014.
11. The directors are M Daniel, L M M Daniel, M L Gizzi and V M Gizzi.
12. The appellant purchased a property at 9 Kings Drive, Thames Ditton, KT7 0TH on 10 October 2014 and the Stamp Duty Land Tax return showed that the purchase price was £650,000.
13. On 1 April 2016 the threshold value for properties coming within the scope of ATED legislation was reduced from £1 million to £500,000, thereby requiring the appellant to submit an ATED return each year.
14. The filing date for the ATED return for the year ending 31 March 2019 was 30 April 2018.
15. On 21 March 2019 the appellant's Relief Declaration Return was received, 325 days late. The date of submission of the return is not in dispute.
16. On 9 December 2019, HMRC issued a notice of penalty assessment under paragraph 3, Sch. 55 FA 2009 in the amount of £100 to the address at 6A Fairbourne, KT11 2BT.
17. On 23 January 2020, HMRC issued a notice of penalty assessment under paragraph 4, Sch. 55 FA 2009 in the amount of £900, calculated at £10 per day for 90 days, to the same address.
18. On 23 January 2020, HMRC issued a notice of penalty assessment under paragraph 5, Sch. 55 FA 2009 in the amount of £300 to the same address.
19. On 12 December 2019, the appellant made an appeal under paragraph 20 Sch. 55 FA 2009 in respect of the initial penalty charged. In the absence of a reply the appellant sent an email on 30 January 2020.
20. On 31 January 2020 the appellant sent a reconsideration request letter following receipt of the daily and six-month late filing penalty notices.
21. On 4 February 2020, HMRC issued a decision letter to the appellant upholding the decision to charge the initial penalty. This letter also offered a statutory review or the option to appeal to the First-tier Tribunal.
22. On 10 February 2020, the appellant accepted an offer of a review and also referred to the subsequent daily and six-month late filing penalties.

23. On 20 February 2020, HMRC issued their review conclusion letter to the appellant which upheld the decision to charge late filing penalties.

24. On 25 March 2020, the appellant lodged an appeal with the First-tier Tribunal. HMRC do not object to the late submission of the appeal.

Points at issue

25. Whether the late filing penalties charged to the appellant were correctly issued.

26. Whether the appellant has a reasonable excuse for the late filing of its ATED relief return. If a reasonable excuse exists, whether the return was received without any unreasonable delay once any excuse had ended.

27. Whether HMRC's decision in relation to special reduction of the penalties was flawed.

Burden of Proof

28. The onus of proof is for HMRC to show that the penalties have been correctly imposed and calculated. The burden then shifts to the appellant to demonstrate that a reasonable excuse exists for late filing.

29. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.

Appellant's grounds of appeal

30. The appellant's grounds are:

- i. The appellant's proprietors were unaware of the obligation to file an ATED return.
- ii. There was no liability to tax in any event.
- iii. The appellant has made a significant contribution to the economy and HMRC should show some leniency.

HMRC's case

31. HMRC's records show the ATED relief return for the year ending 31 March 2019 was received on 21 March 2019.

32. In accordance with s 159 FA 2013, the appellant's ATED return was received 325 days late. Where a person fails to submit a return by the statutory deadline, a penalty may apply.

33. Sch. 55 FA 2009 operates to protect the integrity of the ATED system by charging penalties to taxpayers who fail to meet the statutory deadlines as required.

34. There are no statutory requirements within the Finance Act 2013 (“FA 2013”) which require HMRC to give notice to the taxpayer to file an ATED relief return.
35. A late filing penalty is chargeable where a taxpayer is late in filing their Tax return and penalties for Late Filing are charged under Sch. 55 FA 2009.
36. Paragraph 1 of Sch. 55 FA 2009 provides that:
- “1(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, specified in the Table below on or before the filing date.”
37. The table is at paragraph 1(5) and includes a return for ATED in accordance with s 159 and s 160 FA 2013.
38. Schedules 33, 34 and 35 FA 2013 extended the penalty provisions of Sch. 55 FA 2009 to include ATED.
39. In accordance with Paragraph 3 of Sch. 55 FA 2009, as the appellant did not submit a return by the filing date of 30 April 2018, the appellant was liable to a penalty of £100.
40. The £100 penalty notice gives a warning of daily penalties if the return has not been filed after three months. The penalty notice stated that daily penalties of £10 would be chargeable if the return was not filed by 1 August 2018, being 3 months after the filing date.
41. As the appellant’s ATED relief return was late by 325 days, penalties were issued under paragraph 3 on 9 December 2019, and on 23 January 2020 under paragraphs 4 and 5 of Sch. 55 FA 2009.

Reasonable excuse

42. Paragraph 23 of Sch. 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.
43. The law provides that two situations are not capable of being considered a reasonable excuse:
- i. An insufficiency of funds, unless attributable to events outside the appellant’s control; and
 - ii. Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
44. There is no statutory definition of reasonable excuse, which “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* at paragraph 19).

45. HMRC consider reasonable excuse to be something that stops a person from meeting a tax obligation despite them having taken reasonable care to meet that obligation. As Judge Medd QC in *The Clean Car Co Ltd* explained:

“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? Put in another way, which does not I think alter the sense of the question; was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?”

46. HMRC submit that the First-tier Tribunal is required to approach the question of a reasonable excuse in line with the Upper Tribunal decision in *Perrin v HMRC* at paragraph 81:

“81. 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.”

47. HMRC therefore submit that whether a person has a reasonable excuse will depend on the particular circumstances in which the failure occurred and the abilities of the person who has failed. What is a reasonable excuse for one person may not be a reasonable excuse for another.

48. If there is a reasonable excuse it must exist throughout the failure period.

49. The appellant’s proprietors assert that the following facts may constitute a reasonable excuse for their failure to file a return for the year ended 31 March 2019:

- i. They were unaware of the obligation to file an ATED return.
- ii. There was no liability to tax in any event.

Unaware/Ignorance of the law

50. In *Perrin v HMRC*, the Upper Tribunal addressed the question whether ignorance of the law can provide a reasonable excuse at paragraph 82 of their decision, when they concluded:

“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.”

51. HMRC submit that it was not objectively reasonable in the circumstances of this particular case, for the appellant to have been ignorant of their obligation to file a return.

52. In their letter dated 10 February 2020 one of the appellant’s director’s states:

“I’ve never read any of this legislation and I find it extremely tedious to try and understand what it all means. I think it’s ridiculous and grossly unfair that I should be expected to know about all this legislation.....”.

HMRC contend this is not a reasonable course of action for the appellant to follow.

53. When viewed objectively it is not reasonable for the appellant to be unaware of their filing obligations.

54. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary everyday responsibilities of the appellant to ensure their return was filed by the legislative date.

55. HMRC do not believe that a lack of awareness of the law is a reasonable excuse as this would mean that those people who choose to remain ignorant of the law would benefit over those who knew the law and had complied with it, as set out in *David & Jennifer Hesketh*. In Para.89 Mosedale J says:

“The appellants’ ignorance of their liability to make NRCGT returns cannot amount to a reasonable excuse. It was the cause of their failure to make timely returns, but it does not excuse their failure. The obligation to file was not complex nor uncertain, nor was any complexity or uncertainty in the law the reason for their failure to file on time. They didn’t file on time simply because they were unaware of the obligation to do so. Such ignorance of basic law is not a reasonable excuse.”

56. The obligation is on the appellant, be it any of the responsible officers, to ensure that they have taken action that is appropriate and necessary to enable compliance with tax regime requirements at all times. It is a reasonable expectation that an individual or business would undertake such action, thus assisting them in fulfilling their statutory obligations.

57. Initial guidance on the Annual Tax on Enveloped Dwellings was published in HMRC's website on 4 August 2013 and following the changes to the threshold announced in the Budget on 19 March 2014, the guidance was updated on 20 March 2014.

58. The guidance published on 20 March 2014 can be viewed by following this link:

<http://webarchive.nationalarchives.gov.uk/20150331171331/https://www.gov.uk/annual-tax-on-enveloped-dwellings-the-basics>.

59. HMRC's published guidance on ATED includes the requirement to file a return, including a relief return. HMRC's position is that a reasonable person, acquiring a property of value, which the appellant did in 2014, would make enquiries into the tax position of such an acquisition. Such information has been available, including that the tax was introduced in FA 2013, five years before the due date of this return and one year prior to the purchase of the property.

Proportionality and Fairness

60. The penalties charged are proportionate and the penalty regime is proportionate to its aim.

61. The penalty regime at Sch. 55 FA 2009 is an administrative means of securing the production of timely returns. Its aim is to encourage compliance, not punish defaults.

62. In *Barry Edwards v HMRC*, the Upper Tribunal confirmed at paragraphs 85 and 86 that the Sch. 55 regime was proportionate and penalties are due even in circumstances where there is no additional tax liability:

“85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime 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.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Sch 55 FA2009 cannot be regarded as disproportionate in circumstance where no tax is ultimately found to be due...”

63. The penalty regime includes provisions for reasonable excuses and special circumstance which allow mitigation in appropriate cases.

64. Each case however is taken on its own merits. The Upper Tribunal found in *Hok Ltd v HMRC* that the First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair (at paras 36-58). The decision of the Upper Tribunal creates a precedent and is binding on the First-tier Tribunal in all cases where similar issues are raised.

65. In their letter dated 10 February 2020 the appellant refers to the delay in responding to its original appeal letter. The delay in replying to correspondence did not result in the imposition of the daily and six-month late filing penalties. The lateness in submitting the return had already occurred. If the appellant is unhappy with the advice or service they have received they have recourse to HMRC's complaints procedures.

Leniency

66. In the grounds for appeal and their letter dated 10 February 2020 the appellant refers to problems encountered whilst developing the property and the impact of other duties on the profitability of the business.

67. HMRC contend that the arguments from the appellant about the problems they encountered are nothing out of the ordinary and are normal business risks.

68. Whilst acknowledging the appellant's current circumstances, HMRC contend these do not have any bearing on the appellant's obligation to file a return by 30 April 2018. If the appellant has difficulty in paying future liabilities in respect of any head of duty they should contact HMRC's Business Payment Support Service to discuss a time to pay arrangement.

69. Penalties are in place to promote efficient operation of the taxation system and are intended as a measure of fairness, so that customers who file late do not gain any advantage over those who file on time. The amount of the penalties charged is set within the legislation. HMRC have no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalties would mean that HMRC were not adhering to their own legal obligations.

70. In order for the appeal to succeed, the appellant must demonstrate that a reasonable excuse existed which prevented them from complying with their filing obligations and that the return was filed within a reasonable time of that excuse ceasing.

71. Based on the evidence held, HMRC submit that no reasonable excuse exists for the late submission of the return and the penalties were correctly charged in accordance with legislation.

Special Reduction

72. Paragraph 16 of Sch. 55 FA 2009 provides HMRC with discretion to reduce any penalty charged under this Schedule if they think it right to do so because of “special circumstances”.

73. Special circumstances are undefined save that, under paragraph 16(2), it does not include:

- i. Ability to pay, or
- ii. The fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

74. HMRC contend that the purpose of Sch. 55 FA 2009 is to encourage timely compliance with filing obligations. In the absence of the penalty regime to encourage that compliance, it would be much more difficult to administer the tax system.

75. Paragraph 16 Sch. 55 FA 2009 may be applied where, in HMRC’s opinion, the taxpayer’s circumstances are such that the application of a penalty at the statutory level would not be appropriate. This may include circumstances where imposing the penalty would be contrary to the clear compliance intention of the penalty law

76. In *Barry Edwards v HMRC*, the Upper Tribunal decided at paragraphs 68-74 that the meaning of special circumstances should not be given a restrictive interpretation. Special circumstances may include any factor which means that a decision to charge a penalty at the level determined by statute would be contrary to Parliament’s intent when the penalty regime was introduced. [AB, Pages 154-155]

77. To be special, any particular circumstance may or may not be specific to the individual taxpayer, but it must be relevant to the issue under consideration. If relevant, the circumstance must be sufficiently special such that HMRC consider it right to reduce a penalty under paragraph 16 Sch. 55 FA 2009.

78. The appellant makes several statements about their circumstances in the letter dated 10 February 2020 to support their view that they should not have been charged penalties under Sch. 55 FA 2009, as follows:

- i. Unaware of the obligation to file an ATED return.
- ii. No liability to tax.
- iii. The appellant has made a significant contribution to the economy and HMRC should show some leniency.
- iv. HMRC’s refusal to communicate verbally and the delay in providing a written response.

79. HMRC have considered the appellant’s circumstances and submit that a special reduction is not appropriate as the circumstances do not give rise to an instance where

the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.

Conclusion

80. The initial burden of proof is on HMRC to prove that they have correctly imposed and calculated the penalties. They must show that they have met the conditions set out in Sch. 55 FA 2009.

81. The filing date for the ATED return for the year ending 31 March 2019 was 30 April 2018. On 21 March 2019 the appellant's Relief Declaration Return was received, 325 days late.

82. The fixed penalty of £100 for the initial failure is automatic if the return is not filed by the filing date.

83. With regard to the daily penalties, if after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Sch. 55 FA 2009.

84. Paragraph 4(1) of Schedule 55 states that:

“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.”

85. The ATED return was due on 30 April 2018. The return was filed on 21 March 2019, and so the return was filed more than three months after the due date. Paragraph 4(1)(a) is therefore satisfied.

86. The warning of daily penalties being chargeable is routinely contained in the initial fixed £100 penalty notice, which specifies the date from which daily penalties will start to accrue. After the initial penalty notice, there is a three-month period for the return to be filed before the daily penalty period commences. In the instant case, the £100 penalty notice was not issued to the appellant until 9 December 2019, over a year and three months after the start of the daily penalty period and over eight months after the return had been filed.

87. For the daily penalties to be properly imposed, all three conditions must be satisfied under para 4 of Sch. 55 FA 2009, the third of which under sub-para 4(1)(c) above is that HMRC have given notice to [the taxpayer] specifying the date from which the penalty is payable. Therefore, a taxpayer is liable to a penalty under paragraph 4 only if the required notice has been given. Notice cannot of course be given retrospectively.

88. HMRC's notices of 9 December 2018 and 23 January 2020 respectively notifying the appellant of the £100 penalty and that daily penalties had been imposed cannot be construed as having given the requisite *notice* under para 4(1)(c). Whilst the 9 December 2018 letter gave a "warning" of daily penalties and the 23 January 2020 letter stated that the daily penalties of £900 were in relation to the relevant period of delay, the notices were given retrospectively. Whilst this does not affect the £100 penalty notice, the warning does not satisfy the provisions of para 4(1)(c), the purpose of which is to ensure that the taxpayer has been given due notice allowing him to take remedial action at any time during the daily penalty period. In this instance the appellant was not afforded that opportunity. Clearly the requisite notice was not given under para 4(1)(c).

89. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Sch. 55 FA 2009. As with the £100 penalty, the £300 penalty is automatic. The appellant has not shown a reasonable excuse and therefore both penalties were properly charged.

90. For the above reasons the appeal is allowed in part:

- i. The Tribunal finds that the penalties imposed in the amounts of £100 and £300 were correctly charged in accordance with the law. There are no special circumstances which might have allowed a reduction in the penalties.
- ii. HMRC have not discharged the burden upon them for the daily penalties to be chargeable. The daily penalties of £900 are therefore cancelled.

91. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 3 DECEMBER 2020